

EDITOR'S NOTE

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No. 84-1513-CSY Title: California, Petitioner
Status: GRANTED v.
Dante Carlo Ciraclo

Docketed: Court: Court of Appeal of California,
March 22, 1985 First Appellate District

Counsel for petitioner: Sullivan, Laurence K.

Counsel for respondent: Krause, Marshall W.

Entry	Date	Note	Proceedings and Orders
1	Mar 22 1985	G	Petition for writ of certiorari filed.
3	Apr 1 1985		Order extending time to file response to petition until May 10, 1985.
4	Mar 29 1985		Application for stay filed (A-736).
5	Apr 1 1985		Response requested - Due April 8, 1985, COB.
6	Apr 8 1985		Response filed.
7	Apr 9 1985		Application for stay granted by Fehndust, J.
8	May 10 1985		Brief amicus curiae of Appellate Committee of the CA District Attorneys Assn. filed.
9	May 10 1985		Brief of respondent Dante Ciraclo in opposition filed.
10	May 10 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
11	May 14 1985		DISTRIBUTED, May 30, 1985
12	May 20 1985	X	Reply brief of petitioner California filed.
13	Jun 3 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
14	Jun 3 1985		Petition GRANTED. *****
15	Jun 15 1985	G	Motion of respondent for appointment of counsel filed.
16	Jun 15 1985		Supplement to motion for appointment of counsel filed.
18	Jun 24 1985		Motion for appointment of counsel GRANTED and it is ordered that Marshall W. Krause, Esquire, of Larkspur, California is appointed to serve as counsel for the respondent in this case, pursuant to Rule 46.6 of the rules of this court.
19	Jun 28 1985		Joint appendix filed.
23	Jul 1 1985		Order extending time to file brief of petitioner on the merits until August 8, 1985.
24	Aug 2 1985		Brief amicus curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
25	Aug 8 1985		Brief amicus curiae of Washington Legal Foundation filed.
26	Aug 8 1985		Brief amicus curiae of Indiana, et al. filed.
27	Aug 8 1985		Brief amicus curiae of Criminal Justice Legal Foundation filed.
28	Aug 8 1985		Brief of petitioner California filed.
30	Aug 19 1985		Order extending time to file brief of respondent on the merits until October 4, 1985.
31	Sep 17 1985		Record filed.
32	Oct 4 1985		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
33	Oct 4 1985		Brief of respondent Dante Ciraclo filed.
34	Oct 4 1985		Brief amicus curiae of Civil Liberties Monitoring Project

Entry	Date	Note	Proceedings and Orders

			filed.
35	Oct 4 1985	Brief amicus curiae of ACLU, et al. filed.	
36	Oct 18 1985	CIRCULATED.	
37	Oct 22 1985	SET FOR ARGUMENT, Tuesday, December 10, 1985. (4th case).	
38	Nov 27 1985	X Reply brief of petitioner California filed.	
39	Dec 10 1985	ARGUED.	

MAR 22 1985

ALEXANDER L. STEVENS,
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAULO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether police observation from aircraft of a fenced residential yard is a search under the Fourth Amendment of the United States Constitution.
2. May police reasonably rely on a judicial warrant to seize contraband when probable cause is based on an aerial observation which is fully disclosed to the magistrate but subsequently held unlawful?

TABLE OF CONTENTS

	<u>PAGE</u>
<u>QUESTIONS PRESENTED</u>	i
<u>OPINIONS BELOW</u>	2
<u>JURISDICTION</u>	2
<u>CONSTITUTIONAL PROVISIONS INVOLVED</u>	3
<u>STATEMENT OF THE CASE</u>	3
A. <u>STATE PROCEEDINGS</u>	3
B. <u>FACTS</u>	5
<u>REASONS FOR GRANTING THE WRIT</u>	8
<u>ARGUMENT</u>	
I A PHYSICALLY NONINTRUSIVE OBSERVATION OF A READILY SEEN OBJECT IN A FENCED YARD FROM AIRCRAFT IN NAVIGABLE AIRSPACE IS NOT A SEARCH	12
II EVIDENCE SEIZED IN GOOD FAITH RELIANCE ON A JUDICIAL WARRANT IS ADMISSIBLE WHERE PROBABLE CAUSE IS SUBSEQUENTLY DEEMED A PRODUCT OF AN ILLEGAL SEARCH FULLY DISCLOSED TO THE MAGISTRATE	20
<u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Alderman v. United States,</u> 394 U.S. 165, 177 (1969)	22
<u>Dow Chemical Co. v. United States,</u> 749 F.2d 307, (6th Cir. 1984)	9
<u>Illinois v. Gates,</u> 462 U.S. 213, 238 (1983)	23
<u>Katz v. United States,</u> 389 U.S. 347 (1967)	3
<u>NORML v. Mullen,</u> No. (83-4037 RPA (D.C.N.Cal. 1985)	18
<u>Oliver v. United States,</u> 466 U.S. ___, 80 L.Ed.2d 214, 223-227; 104 S.Ct. 1735, (1984)	8,13
<u>People v. Joubert,</u> 118 Cal.App.3d 637 (1981)	26
<u>People v. Sneed,</u> 32 Cal.App.3d 535 (1973)	9
<u>People v. St. Amour,</u> 104 Cal.App.3d 886 (1980)	26
<u>People v. Superior Court (Stroud),</u> 37 Cal.App.3d 836 (1974)	26
<u>Randall v. State,</u> 458 So.2d 822, (Fla.App.2 Dist. 1984)	8,15
<u>State v. Knight,</u> 621 P.2d 370 (Hawaii 1980)	9

TABLE OF AUTHORITIES (CONT).

	<u>PAGE</u>
<u>State v. Rogers,</u> 673 P.2d 142, (N.M.App.1983)	8,9
<u>State v. Stachler,</u> 570 P.2d 1323, (Hawaii 1977)	8,9
<u>Tuttle v. Superior Court,</u> 120 Cal.App.3d 320 (1981)	26
<u>United States v. Bassford,</u> F.Supp. ___, No. 84-22-B (D. Maine, filed Jan. 28, 1985)	8,14
<u>United States v. Causby,</u> 328 U.S. 256, 261 (1946)	13
<u>United States v. Henderson,</u> 746 F.2d 619 (9th Cir. 1984)	10,24
<u>United States v. Karo,</u> 468 U.S. ___, 82 L.Ed.2d 530; 104 S.Ct. 3296 (1984)	24
<u>United States v. Knotts,</u> 460 U.S. 276, 282 (1983)	13,16
<u>United States v. Leon,</u> 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984)	4,10
<u>United States v. Marbury,</u> 732 F.2d 390 (5th Cir. 1984)	9
<u>United States v. Thornton,</u> 746 F.2d 39, 49 (D.C. Cir. 1984)	11,20

TEXT, STATUTES AND AUTHORITIES

	<u>PAGE</u>
California Health & Safety Code	
§ 11358	3
§ 11360(a)	3
Title 28, United States Code	
§ 1257(3)	2
42 U.S.C.	
§ 1983	19
United States Constitution Amendment IV	3,4,8

NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
DANTE CARLO CIRAULO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

Petitioner, State of
California, respectfully prays that a
writ of certiorari issue to review the
judgment of the California Court of
Appeal, First Appellate District, filed
on November 20, 1984.

OPINIONS BELOW

The opinion filed by the California Court of Appeal is reported at 161 Cal.App.3d 1081, 208 Cal.Rptr. 93.

JURISDICTION

The judgment of the California Court of Appeal was filed on November 20, 1984. (Appendix A). The People's petition for rehearing was denied on December 10, 1984 (Appendix B). On January 23, 1985, the California Supreme Court denied the People's petition for hearing (Appendix C). By orders filed February 15 and March 14, 1985, the California Court of Appeal stayed its remittitur until March 25, 1985 to permit this petition. (Appendices D, E).

This Court's jurisdiction is invoked under Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV.

STATEMENT OF THE CASEA. STATE PROCEEDINGS

On August 8, 1983, respondent was charged in the Santa Clara County Superior Court, with feloniously cultivating and selling marijuana (Cal. Health & Saf. Code, §§ 11358, 11360(a)). (CT 50).^{1/}

Citing Katz v. United States, 389 U.S. 347 (1967), respondent contended that police aerial observation of his home's fenced yard violated the Fourth Amendment. Respondent moved unsuccessfully in the trial court to suppress the aerial observation, and, as fruit, evidence seized from his yard

1. "CT" designates the Clerk's Transcript on appeal.

under a search warrant. (CT 25-31, 33-41, 81). Respondent later pled guilty to the cultivation charge (CT 92-93).

Respondent appealed to the California Court of Appeal, First Appellate District. (CT 109). At that court's request, the parties addressed United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). (Appendix A:4).

The California Court of Appeal reversed; holding that the aerial observation was a warrantless search of the curtilage violating the Fourth Amendment, the California court suppressed all evidence. "Leon has no application . . . [A]n unconstitutional search cannot be . . . the basis for . . . a search warrant or the Fourth Amendment would be rendered meaningless," the court held. (Appendix A:6, 8-9; citations and fn. omitted.)

B. FACTS

On September 2, 1982, Santa Clara police narcotics officer Schutz received an anonymous phone message that marijuana was seen growing in the backyard of respondent's residence. (CT 5, 7-8, 11, 14, 36, 37). Officer Schutz was unable to observe the yard from the ground because of a 6-foot outer fence and an inner fence approximately 10-feet high. Officer Schutz was aware that marijuana growers frequently conceal cultivation by elevated fences. (CT 15, 37-38).

Later that day, Schutz chartered an airplane at the San Jose airport to observe and photograph the yard. (CT 11-12, 38). Flying at not less than 1000 feet altitude, and without visual aids, Schutz identified by its distinctive color, then photographed, a 15 by 25 foot marijuana

garden of 8 to 10 feet tall plants within the inner fence. (CT 12-16, 38).

Officer Schutz made ten to twelve observations of houses during the same flight, each based on a report of marijuana cultivation. Five reports were confirmed. Other aircraft, using the San Jose airport, were in the area. (CT 11-12, 15-17).

On September 8, 1982, Schutz obtained a search warrant. His affidavit described in detail the tip, the ground and aerial observations, as well as the plane's altitude and the absence of visual aids for the aerial sighting. (CT 34-40).^{2/} The warrant was executed the following day. Seventy-three marijuana plants averaging eight feet

2. An aerial photograph, attached to the affidavit, depicts an area of homes and streets including respondent's property. (CT 14, 15, 49).

tall were seized from respondent's yard. (CT 6, 17).

REASONS FOR GRANTING THE WRIT

The California Court of Appeal ignores the reasoning in Oliver v. United States, 466 U.S. ___, 80 L.Ed.2d 214, 223-227; 104 S.Ct. 1735, 1740-1743 (1984), regarding reasonable expectations of privacy, to hold that aerial observation of a fenced residential yard is subject to the Fourth Amendment's warrant requirement. This decision conflicts with both federal and state decisions upholding physically unobtrusive aerial observation of areas immediately surrounding a home which were closed to ground view from outside the property. (United States v. Bassford, ___ F.Supp. ___, No. 84-22-B (D. Maine, filed Jan. 28, 1985); Randall v. State, 458 So.2d 822, 824-826 (Fla.App.2 Dist. 1984); State v. Stachler, 570 P.2d 1323, 1326-1329 (Hawaii 1977); State v. Rogers, 673 P.2d 142, 143-144 (N.M.App.

1983). Cf. People v. Sneed, 32 Cal.App.3d 535, 540-543 (1973) [intrusive low altitude]; State v. Knight, 621 P.2d 370, 373 (Hawaii 1980) [following Stachler but rev'd on other grounds].)^{3/} This Court should intervene to resolve that conflict.

Law enforcement will be severely hampered by this ruling. Under the decision, marijuana cultivation is entitled to "privacy" within fenced residential yards. Unless police are on routine air patrol - an unprincipled distinction by the California Court which also conflicts with those

3. Presently before this Court is a case involving visually augmented aerial surveillance of "industrial curtilage". Dow Chemical Co. v. United States, 749 F.2d 307, (6th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3656 (U.S. Feb. 7, 1985) (No. 84-1259). Cf. United States v. Marbury, 732 F.2d 390, 398-399 (5th Cir. 1984) (aerial surveillance of commercial gravel pit upheld.).

decisions - officers must henceforth guess if they are seeing solidly fenced curtilage, open field or a combination. The impracticality of this decision and its adverse impact on California's efforts against marijuana cultivation justify review.

The California Court of Appeal's grudging interpretation of United States v. Leon, supra, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) merits certiorari standing alone. Under the Court of Appeal's interpretation of Leon, objectively reasonable reliance by police on a judicial warrant to seize property is irrelevant if the warrant is subsequently deemed fruit of an illegal search. (Cf. United States v. Henderson, 746 F.2d 619, 624-625 (9th Cir. 1984) [conflicting in principle].)

Under Leon, police do not act at their peril when they rely in good faith on a judicial warrant to seize property when the magistrate reasonably found probable cause was lawfully acquired. This point has not been lost on the United States Court of Appeals for the District of Columbia Circuit which recently applied Leon on that basis. United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984). Expression of that principle by this Court will ensure Leon's consistent application in the frequently encountered case where probable cause for a warrant is undermined by a reviewing court's subsequent appraisal of earlier police conduct.

ARGUMENT

I

A PHYSICALLY NONINTRUSIVE
OBSERVATION OF A READILY
SEEN OBJECT IN A FENCED YARD
FROM AIRCRAFT IN NAVIGABLE
AIRSPACE IS NOT A SEARCH

The California Court of Appeal finds aerial observation by police of marijuana plants in a fenced yard to be "a direct and unauthorized intrusion into . . . the home." (Appendix A:19). Curtilage, closed to ground view, is now fictionally opaque to all California peace officers not on routine air patrol.

The lower court fails to acknowledge that "the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself" was reserved by this Court in

Oliver v. United States, supra, 466 U.S. at ___, 80 L.Ed.2d at 225, fn. 11, 104 S.Ct. at 1742, fn. 11.

Oliver does not say that police may lawfully survey only "open fields" from the air, but refers to "lands". Indeed, the Fourth Amendment has never been extended by this Court to preclude visual observation from public places of readily discernible items on particular premises. (See United States v. Knotts, 460 U.S. 276, 282 (1983).) Airplanes in navigable space, not physically interfering with the enjoyment of property below, occupy such public places. (See United States v. Causby, 328 U.S. 256, 261, 266 (1946).)

The Court of Appeal erroneously concludes that the height and existence of respondent's fence manifests a reasonable expectation of privacy.

Oliver v. United States, supra, 466 U.S. ___, 80 L.Ed.2d at 227; 104 S.Ct. at 1743, however, holds that private fences do not establish an expectation of privacy recognized by society. "Rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (Ibid.)

Society is not prepared to recognize the legitimacy of privacy expectations from physically nonintrusive observation from navigable airspace, when objects, readily observable with the naked eye, are knowingly placed within curtilage open to aerial view. (See United States v. Gassford, supra, slip op. at 6-7, 10-11; State v. Stachler, supra, 570 P.2d at 1328-1329; State v. Rogers, 673 P.2d at 143-144). In such circumstances, "[s]ociety appears willing to accept aerial surveillance as a

reasonable and necessary investigative tool in effective modern law enforcement." (Randall v. State, supra, 458 So.2d at 825.)

Moreover, "[t]here would appear to be no sound basis for distinguishing between 'curtilage' and 'noncurtilage' areas equally visible from the air. In most cases it would be impracticable to view one without contemporaneously viewing the other." (United States v. Bassford, supra, slip op. at 7.)

Under the Court of Appeal's decision, the airborne officer will "have to guess before every search whether landowners had erected fences sufficiently high . . . to establish a right of privacy." (Oliver v. United States, supra, 466 U.S. ___, 80 L.Ed.2d at 226; 104 S.Ct. at 1742-1743.) Police will have to decide if a fence encloses curtilage, open fields or a

combination of both. In many cases, the officer will not know whether he "searched" or only "looked" until he already has seen. The decision provides no meaningful guidance to police.

There is an urgent need to provide such guidance. This decision will severely impair law enforcement efforts to reduce marijuana cultivation in California. This Court's recent decisions illustrate the significant role played by aerial observation in the field. (See e.g., United States v. Knotts, supra, 460 U.S. 276, 279.)^{4/}

4. That role has not gone unnoticed by commentators, (see, Comment, Aerial Surveillance: A Plane View Of the Fourth Amendment, 18 Gonz.L.Rev. 307, 321 (1982-83)) and has provoked much debate (see e.g., Annotation, Aerial Observation or Surveillance As Violative Of Fourth Amendment Guaranty Against Unreasonable Search and Seizure, 56 ALR Fed. 772;

(FOOTNOTE 4 CONTINUED ON NEXT PAGE)

Because the California court's exception for routine patrol observation is unrealistic, its decision will provide safe havens for the California marijuana industry so long as it prunes its plants behind high fences. The critical role played by aerial surveillance in drug enforcement justifies this Court's review.

Confusion is now growing in this area such that a definitive

(FOOTNOTE CONTINUED):

Comment, Fourth Amendment Implications of Warrantless Aerial Surveillance, 17 Val.L.Rev. 309 (1983); Comment, Warrantless Aerial Surveillance: A Constitutional Analysis, 35 Vand.L.Rev. 409 (1982); Note, Aerial Surveillance: Overlooking the Fourth Amendment, 50 Fordham L.Rev. 271 (1981); Comment, Open Air Searches and Enhanced Surveillance in California, 21 Santa Clara L.Rev. 779 (1981); Comment, Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy, 11 Cal.W.L.Rev. 505 (1975); Comment, Police Helicopter Surveillance, 15 Ariz.L.Rev. 145 (1973).)

statement of law is required. Recently, for example, the Federal District Court for the Northern District of California, acting under 42 U.S.C. § 1983, granted a preliminary injunction against state and federal officials overseeing California's Campaign Against Marijuana Planting (CAMP) enjoining, inter alia, use of helicopters for surveillance except of open fields. However, under the terms of the injunction, this prohibition does not apply to fixed wing aircraft. NORML v. Mullen, No. (83-4037 RPA (D.C.N.Cal., 1985) (Order Granting Preliminary Injunction) 33.

When viewed in light of Mullen, the Fourth Amendment's application to aerial observation of curtilage, after Ciraolo, is a puzzle. This Court should intervene so that police flying in navigable airspace in a physically

nonintrusive manner are allowed to see objects openly visible to anyone who looks.

In this case, officers did precisely that. There is no hint of repeated flyovers or other harassment. Police were 1000 feet or higher over a city accustomed to air traffic from a neighboring airport. The marijuana garden, composed of 8 to 10 feet tall plants, was readily distinguishable by its size, the plants' height and their distinctive color. Not readily distinguishable from the air or the ground or the law was the boundary created by the California court separating protected from unprotected areas. The police deserve brighter lines than provided by this decision.

II

EVIDENCE SEIZED IN GOOD FAITH
RELIANCE ON A JUDICIAL WARRANT
IS ADMISSIBLE WHERE PROBABLE
CAUSE IS SUBSEQUENTLY DEEMED A
PRODUCT OF AN ILLEGAL SEARCH
FULLY DISCLOSED TO THE
MAGISTRATE

The California Court of Appeal flouts United States v. Leon, supra, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) which it deems inapplicable whenever a warrant is based on information that is later ruled illegal.

Leon does not support such an overbroad holding. Evidence seized in good faith reliance on a judicial warrant is admissible when the magistrate reasonably found probable cause was acquired lawfully, notwithstanding a subsequent contrary determination. In United States v. Thornton, supra, 746 F.2d 39, the Court of Appeals was confronted with the claim that a warrantless search of a trash can was

unconstitutional, thus, rendering probable cause for a later search warrant insufficient. The court found it unnecessary to reach the question, under Leon: "It was eminently reasonable for the Superior Court judge [who issued the warrant], and the police officers, to believe that the trash bag search was constitutional" under the "overwhelming weight of authority" upholding such searches. (Id., at 49; fn. omitted).

The California Court of Appeal, however, observes that Leon neither applies to warrantless searches nor overrules the "fruit of the poisonous tree" doctrine. (Appendix A:6). From this truism it discerns another:

"[A]n unconstitutional search cannot be . . . the basis for . . . a search warrant . . ."

(Appendix A:8; fn. and citations omitted.) It concludes that "Leon does not permit the use of the evidence seized in the instant case." (Appendix A:5).

The conclusion does not follow from its premises. Of course, an illegal search may not "form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation [citations]." Alderman v. United States 394 U.S. 165, 177 (1969). That principle, however, merely establishes a factual predicate to Leon's application here. The warrant has been found

defective, subsequent to its execution, based on an illegal search, according to the California Court of Appeal.

The Fourth Amendment imposes no obligation on police to describe, when seeking a warrant, the precise method by which facts were gathered, so long as probable cause is present. (See Illinois v. Gates, 462 U.S. 213, 238 (1983). When police go further and detail how probable cause was acquired, a magistrate's warrant is an implicit judicial determination that probable cause was obtained constitutionally. If that appraisal is subsequently overturned, when it was reasonable under the law at the time, the officer seizing property under the warrant stands in identical relation to the Fourth Amendment as the officer in Leon. The property is seized by police relying in good faith on a judicial officer's

Fourth Amendment determination which later proves erroneous. Leon compels that the error be ascribed to its legitimate source, the magistrate, and the evidence admitted.^{5/}

The California Court of Appeal believed that Leon was impliedly limited by Segura v. United States, supra, 468 U.S. ___, 82 L.Ed.2d 599, 104 S.Ct. 3380.

5. Cf., United States v. Henderson, supra, 746 F.2d 619, 624-625 (9th Cir. 1984), where evidence, seized under a search warrant based on results of beeper monitoring, authorized by court order, was held admissible under Leon. The reviewing court assumed that United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530; 104 S.Ct. 3296 (1984) retroactively invalidated the beeper order, leaving the search warrant affidavit insufficient without the beeper information. Even so, "the search warrant was based on a probable cause determination that comported fully with applicable legal standards at the time," which allowed warrantless beeper monitoring. (746 F.2d at 625). While the existence of the beeper order factually distinguishes Henderson, its rationale conflicts in principle with the California Court of Appeal's holding.

Were a contrary reached, according to the California court, the Fourth Amendment would "be rendered meaningless" by Leon. (Appendix A:7-9; fn. and citations omitted.) We disagree.

Segura held, inter alia, that a prior unlawful search did not invalidate a search warrant based on information acquired independent of the police illegality. Nothing in Segura implies that government conduct, reasonably found constitutional by a magistrate, but subsequently deemed illegal, compels suppression of evidence seized in good faith reliance on a search warrant.

Meaningful deterrence of the prior unlawful police conduct is obtained by excluding direct results of the unconstitutional search. (Segura v. United States, supra, 468 U.S. ___, 82 L.Ed.2d at 608, 104 S.Ct. at 3386.)

Thus, information acquired during the overflight, if illegal, is inadmissible at any trial. The Fourth Amendment, rather than being rendered meaningless, is fully vindicated.

In this case, Officer Schutz described in his affidavit the manner by which the crucial aerial observation was made. The magistrate necessarily concluded, on a legitimate view of the law at the time,^{6/} that the overflight complied with the Fourth Amendment. The California Court of Appeal's subsequent decision to the contrary does not

6. See, e.g., Tuttle v. Superior Court, 120 Cal.App.3d 320, 327 (1981), cert. denied, 454 U.S. 1033 (1981); People v. Joubert, 118 Cal.App.3d 637, 645-646 (1981) (quoting State v. Stachler, supra, 570 P.2d 1323); People v. St. Amour, 104 Cal.App.3d 886, 891-894 (1980); People v. Superior Court (Stroud), 37 Cal.App.3d 836, 839-840 (1974); People v. Sneed, supra, 32 Cal.App.3d at 542-543 (dictum).

preclude reasonable reliance by police on the warrant.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal.

DATED: March 22, 1985

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

November 20, 1984

Court of Appeal - First App. Dist.

By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
	)	No. AO26048
Plaintiff and)	
Respondent,	)	Santa Clara
	)	County Superior
v.	)	Court No. 88043
)	
DANTE CARLO CIRAOLLO,)	
)	
Defendant and)	
Appellant.)	
)	

Defendant/appellant Dante Carlo
Ciraolo appeals his conviction of
cultivation of marijuana (Health & Saf.
Code, § 11358) following his plea of
guilty, contending the trial court erred
in failing to suppress the evidence
seized during a search of his residence.

2.

The search was conducted pursuant to a warrant obtained on the basis of information gathered in a warrantless overflight of defendant's residence. For reasons hereafter set forth, we conclude the evidence was inadmissible and reverse.

On September 2, 1982, Santa Clara police officer Shutz received an anonymous phone message that marijuana plants were seen growing in the back yard of a Santa Clara home, later identified as defendant's residence. Shutz initially went by the house on foot and conducted a ground level investigation. He was unable to observe anything because of two fences that completely enclosed defendant's back yard: a 6-foot outer fence, and an inner fence approximately 10 feet high. Officer Shutz undertook an airplane flight that same day with the express purpose of observing and photographing that portion of defendant's residence enclosed by his

3.

fence. The plane was flown at an altitude of 1000 feet. Without visual aids, Shutz observed and photographed a marijuana garden in defendant's back yard. On the basis of the information obtained from the overflight, Shutz procured a search warrant for defendant's home, and upon execution thereof, growing marijuana plants were discovered within the fenced area of the back yard and seized.

Defendant's motion under Penal Code section 1538.5 to suppress the plants was denied. He contends the aerial surveillance violated his reasonable expectation of privacy, protected by the Fourth Amendment and various provisions of the California Constitution.^{1/} The People contend the

^{1/} In light of our decision on Fourth Amendment grounds, we need not reach defendant's remaining contentions.

aerial surveillance was reasonable, citing, inter alia, Oliver v. United States (1984) ___ U.S. ___ [80 L.Ed.2d 214, 104 S.Ct. 1735], United States v. Allen (9th Cir. 1980) 675 F.2d 1373, cert. den. Allen v. United States (1981) 454 U.S. 838, and People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836.

At our request both parties have discussed the applicability of United States v. Leon (1984) ___ U.S. ___ [82 L.Ed.2d 677, 104 S.Ct. 3405]. In Leon, the United States Supreme Court responded affirmatively to the issue of "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be

unsupported by probable cause." (Id., at p. ___ [82 L.Ed.2d at p. 684, 104 S.Ct. at p. 3409].) "[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief." (Id., at p. ___ [82 L.Ed.2d at p. 692, 104 S.Ct. at p. 3416].) However, we conclude that Leon does not permit the use of the evidence seized in the instant case. "The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment" (United States v. Leon, supra, ___ U.S. at p. ___ [82 L.Ed.2d at

p. 699, 104 S.Ct. at p. 3422]; emphasis supplied.)

Defendant correctly notes that our primary focus must be directed to the warrantless search conducted during the overflight. Leon has no application to warrantless searches, nor does it overrule the "fruit of the poisonous tree" doctrine which first bloomed in Nardone v. United States (1939) 308 U.S. 338 [84 L.Ed.2d 307, 60 S.Ct. 266], and ripened in Wong Sun v. United States (1963) 371 U.S. 471 [9 L.Ed.2d 441, 83 S.Ct. 407]. This doctrine forbids the use of after-acquired evidence which is found to be the direct result of an unlawful search or other unlawful conduct. Such evidence may be used only if it can be established that it was acquired or discovered by independent means "'. . . sufficiently distinguishable to be purged of the primary taint.' [Citation.]" (Wong Sun v. United States,

supra, at p. 488 [9 L.Ed.2d at p. 455, 83 S.Ct. at p. 417]; see also Taylor v. Alabama (1982) 457 U.S. 687 [73 L.Ed.2d 314, 102 S.Ct. 2664]; Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d 824, 99 S.Ct. 2248]; Brown v. Illinois (1975) 422 U.S. 590 [45 L.Ed.2d 416, 95 S.Ct. 2254].)

Further confirmation that the Wong Sun doctrine still controls is found in Segura v. United States (1984) ___ U.S. ___ [82 L.Ed.2d 599, 104 S.Ct. 3380] decided the same date as Leon. Segura held that a search of an apartment conducted pursuant to a valid search warrant was not invalidated by a previous illegal entry into the apartment, where the warrant and the information upon which it was based were unrelated to the illegal entry. Segura implicitly recognized that evidence seized pursuant to a warrant based on

facts obtained from a prior unlawful search would be subject to suppression. "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure [citation], but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' [Citation.] It 'extends as well to the indirect as the direct products' of unconstitutional conduct. Wong Sun v. United States . . . [¶] Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." (Segura v. United States, supra, ___ U.S. at p. ___ [82 L.Ed.2d at p. 608, 104 S.Ct. at p. 3386].) In short, an unconstitutional search cannot be used as the basis for issuance of a search warrant or the Fourth Amendment would be

rendered meaningless.^{2/} Segura v. United States, supra, ___ U.S. at p. ___ [82 L.Ed.2d at p. 608, 104 S.Ct. at p. 3386]; Wong Sun v. United States, supra, at p. 488 [9 L.Ed.2d at p. 455, 83 S.Ct. at p. 417]; McGinnis v. United States (1955) 227 F.2d 598, 603-604.)

We thus refocus our attention on the aerial surveillance of defendant's residence, from which evidence was obtained to support the issuance of the search warrant. "The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was 'come at by exploitation of [the initial] illegality

^{2/} Because Leon is limited to searches conducted pursuant to warrant, we need not decide the issue of its possible retroactive application to the instant case.

or instead by means sufficiently distinguishable to be purged of the primary taint."³ (Segura v. United States, supra, ___ U.S. at p. ___ [82 L.Ed.2d at p. 608, 104 S.Ct. at p. 3386], citing Wong Sun v. United States, supra, 371 U.S. at p. 488 [9 L.Ed.2d at p. 455, 83 S.Ct. at p. 417].) It is undisputed that the aerial surveillance provided the sole source the sole source of factual support for the warrant.^{3/}

We disagree with the People's contention that the federal courts have condoned aerial surveillance of areas within the curtilage. Oliver v. United States (1984) ___ U.S. ___ [80 L.Ed.2d

^{3/} Clearly, the anonymous tip received by Officer Shutz did not, by itself, provide probable cause to support a warrant. (Illinois v. Gates (1983) ___ U.S. ___, [76 L.Ed.2d 527, 548-549, 103 S.Ct. 2317, 2332-2333]; accord People v. Reeves (1964) 61 Cal.2d 268, 273-274.)

214, 104 S.Ct. 1735], upon which the People rely, reaffirmed the "open fields" doctrine of Hester v. United States (1924) 265 U.S. 57 [68 L.Ed.2d 898, 44 S.Ct. 445]. Oliver held the Fourth Amendment did not preclude the use of evidence obtained through a warrantless search of secluded but open fields on private property, even though posted with "no trespassing" signs and secured with a locked gate. The court reasoned that open fields, although secluded, were not within the curtilage, and hence not within an area where one could reasonably entertain an expectation of privacy. However, the court made it clear that the area within the curtilage -- "the land immediately surrounding and associated with the home"^{4/} -- was entitled to the "right

^{4/} ___ U.S. ___ [80 L.Ed.2d 225, 104 S.Ct. 1742].

to privacy embodied in the Fourth Amendment."^{5/} "[T]he rule of Hester v. United States, supra, that we affirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.

[Citation.] This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'

^{5/} U.S. ____ [80 L.Ed.2d 224, 104 S.Ct. 1741].

[Citations.]" (Oliver v. United States, supra, ____ U.S. at p. ____ [80 L.Ed.2d at p. 224, 104 S.Ct. at p. 1741], emphasis supplied.)

The Oliver court deemed its decision to be "consistent with the understanding of the right of privacy expressed in our Fourth Amendment jurisprudence [in] Katz v. United States (1967) 389 U.S. 347 [T]he touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy'." (Oliver v. United States, supra, ____ U.S. at p. ____ [80 L.Ed.2d at p. 223, 104 S.Ct. at p. 1740].)

In Katz v. United States, supra, 389 U.S. 347 [19 L.Ed.2d 576, 88 S.Ct. 507], the high court emphasized that the Fourth Amendment protects people, not places, in holding that a

person making a call from a public telephone booth was protected from electronic eavesdropping in the absence of a warrant supported by probable cause. The court held that the Fourth Amendment's protections extended to situations wherein an individual had what has come to be described as a reasonable expectation of privacy. (Accord, People v. Edwards (1969) 71 Cal.2d 1096.) "[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (Katz v. United States, supra, 389 U.S. at pp. 351-352 [19 L.Ed.2d at p. 582, 88 S.Ct. at p. 511]; accord, Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d at p. 223, 104 S.Ct. at p. 1740].) Oliver contains the statement that "both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air."

(Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d 224, 104 S.Ct. 1741], fn. omitted, emphasis supplied.) For this proposition Oliver footnotes a reference to United States v. Allen (9th Cir. 1980) 675 F.2d 1373, and United States v. DeBacker (W.D. Mich. 1980) 493 F.Supp. 1078. (Oliver, supra, ___ U.S. at p. ___ [80 L.Ed.2d 224 fn. 9, 104 S.Ct. 1741].)

Allen involved the helicopter surveillance of a 200-acre ranch on the Oregon coast. The ranch paralleled the ocean for approximately one mile and was separated from the beach by a narrow strip of federal land. It was subjected to regular Coast Guard helicopter overflights for law enforcement and other reasons. The Ninth Circuit held that any resident of the ranch, undoubtedly aware of the ranch's proximity to the seacoast, the functions

of the Coast Guard and the frequency of its overflights, could not reasonably entertain an expectation of privacy. (United States v. Allen, supra, 675 F.2d at p. 1381.) DeBacker involved a flight over open fields on the defendant's farm. No issue of surveillance within the curtilage was involved, and the court found that the defendant could not have had a reasonable expectation of privacy.

Other federal cases we have discovered which deal with aerial surveillance also distinguish between open areas or fields and the curtilage. (See, e.g., United States v. Marbury (5th Cir. 1984) 732 F.2d 390, which upheld a helicopter flight over "the plainly noncurtilage portions" of a "large commercial gravel pit tract" (Id., at p. 398.) Consequently, Oliver's reference to aerial surveillance does not remove Fourth Amendment protection from

the curtilage, wherein the landowner may reasonably expect privacy.

Defendant's back yard is within the curtilage; the height and existence of the two fences constitute objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard. "The historical underpinnings of the 'open fields' doctrine also demonstrate that the doctrine is consistent with respect for 'reasonable expectations of privacy.' As Justice Holmes, writing for the Court, observed in Hester, 265 U.S. at 57, the common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home. [Citation.] The distinction implies that the curtilage . . . warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is

the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' Boyd v. United States, 116 U.S. 616, 630 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. [Citations.]" (Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d at p. 225, 104 S.Ct. at p. 1742].)

From the perspective of defendant's reasonable expectation of privacy we deem it significant that the aerial surveillance of his back yard was not the result of a routine patrol

conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within defendant's curtilage.

In short, we are not dealing with the observation of an open corn field which also contains a cannabis crop. We are confronted instead with a direct and unauthorized intrusion into the sanctity of the home.^{6/} "[A] person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances." (United States v. Allen, supra, 675 F.2d at p. 1380.)

^{6/} "[I]t becomes clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." (Katz v. United States, supra, 389 U.S. at p. 353 [19 L.Ed.2d at p. 583, 88 S.Ct. at p. 512].)

Having determined that the area searched was within defendant's curtilage wherein he could reasonably entertain an expectation of privacy, we must conclude that the warrantless overflight constituted an unreasonable search in violation of the Fourth Amendment. The fruits of that unconstitutional search cannot support a warrant.

The judgment is reversed.

HANING, J.

We concur:

LOW, P.J.

KING, J.

People v. Ciruolo
A026048

Trial
Court:

Superior Court
County of Santa Clara

Trial
Judge:

Honorable Marilyn Pestarino
Zecher

Counsel for
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People v. Ciruolo
A026048

APPENDIX B

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED

December 10, 1984
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
	)	No. AO26048
Plaintiff and)	
Respondent,	)	Santa Clara
	)	County Superior
v.	)	Court No. 88043
)	
DANTE CARLO CIRAULO,)	
)	
Defendant and)	
Appellant.)	
)	

BY THE COURT:

The Petition for Rehearing
filed in the above-entitled cause is
hereby denied.

Dated: December 10, 1984

LOW

P.J.

APPENDIX C

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1ST DISTRICT, DIVISION 5, No. AO26048

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

PEOPLE

v.

DANTE CARLO CIRAOLO

Respondent's petition for
hearing DENIED.

Lucas, J., is of the opinion
the petition should be granted.

BIRD

CHIEF JUSTICE

SUPREME COURT

FILED

January 23, 1985
Laurence P. Gill, Clerk
Deputy

APPENDIX D

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED

February 15, 1985
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
	)	No. AO26048
Plaintiff and)	
Respondent,	)	Santa Clara
	)	County Superior
v.	)	Court No. 88043
)	
DANTE CARLO CIRAULO,)	
)	
Defendant and)	
Appellant.)	
)	

BY THE COURT:

The motion to stay remittitur
pending the timely filing of a petition
for writ of certiorari in the United
States Supreme Court is granted for a
period of 30 days from the date of this
order.

Dated: February 15, 1985

LOW

P.J.

APPENDIX E

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED
March 14, 1985
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
	)	No. AO26048
Plaintiff and)	
Respondent,	)	Santa Clara
	)	County Superior
v.	)	Court No. 88043
)	
DANTE CARLO CIRAULO,)	
)	
Defendant and)	
Appellant.)	
)	

BY THE COURT:

The application to extend stay of remittitur previously granted pending the timely filing of a petition for writ of certiorari in the United States Supreme Court is granted. And said stay is hereby extended to and included March 25, 1985.

Dated: March 14, 1985

LOW

P.J.

PEOPLE OF THE STATE)
OF CALIFORNIA,)
) No. _____
Petitioner,)
)
v.)
)
DANTE CARLO CIRAULO,)
)
Respondent.)
_____)

State of California)
) ss.
City and County of San Francisco)

LAURENCE K. SULLIVAN, a member
of the Bar of the Supreme Court of the
United States, being duly sworn, deposes
and states:

This his business address is
6000 State Building in the City and
County of San Francisco, State of
California; that on March 22, 1985
true copies of the attached Petition for
Writ of Certiorari to the California
Court of Appeal, First Appellate
District in the above-entitled matter
were served on counsel of record by

placing same in envelopes addressed as
follows:

Clerk, United States Supreme Court
1 First Street, N.E.,
Washington, D.C. 20543

Leo Himmelsbach
District Attorney
70 West Hedding Street
5th Floor
San Jose, CA 95110

Clerk, Santa Clara Superior Court
191 N. First Street
San Jose, CA 95113

Phillip H. Pennypacker, Esq.
Conflicts Administrator
190 West Hedding Street, #202
San Jose, CA 95110

Pamela H. Duncan, Esq.
P.O. Box A
300 7th Avenue
Santa Cruz, CA 95062

Clerk of the Court
California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Said envelopes were then sealed
and deposited in the United States mail

at San Francisco, California, with first
class postage thereon fully prepaid.

Laurence K. Sullivan
LAURENCE K. SULLIVAN
Deputy Attorney General

Dated: March 22, 1985



Joan Chiccarella
(NOTARY PUBLIC)

Notary Public in and for the State of
California, City and County of San
Francisco, personally appeared LAURENCE
K. SULLIVAN, known to me to be the
person whose name is subscribed to the
within instrument, and acknowledged that
he executed the same.

RECEIVED

Supreme Court, U.S.
FILED

MAY 10 1985

ALEXANDER L. STEVENS
CLERK

No. 84-1313

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

DANTE CARLO CIRAOLO,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT**

**KRAUSE, BASKIN, SHELL, GRANT & BALLENTINE
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9

i.
QUESTIONS PRESENTED

1. Whether police who conduct a focused aerial search of respondent's enclosed, urban backyard without warrant violate the Fourth Amendment.

2. Whether the State may rely on United States v. Leon to excuse the illegal police conduct which resulted in the gathering of the information upon which a search warrant affidavit was based.

3. Whether the Leon issue (No. 2, above) should be considered in this Court even though it was not raised in the trial court and thus there is no record on the "good faith" vel non of the search warrant affiant.

TABLE OF CONTENTS

	Page
Opinion Below.....	1
Jurisdiction.....	1
Constitutional Provisions Involved.....	1
Statement of the Case.....	2
Statement of Facts.....	2
Reasons For Denying The Writ.....	4
Summary of Argument.....	4
Argument.....	6
1. This Court Both Historically And Very Recently Has Treated The Curtilage Of A Home With The Same Protection As The Interior Of The Home For Fourth Amendment Purposes.....	6
2. The Fourth Amendment Provides Protection Against Aerial Invasions Of The Home And Curtilage From Purposeful Invasion.....	7
3. This Is Not The Case To Decide Whether <u>United States v. Leon</u> Applies To Warrantless Searches Because A Record On The "Good Faith" Of The Officer In Making The Warrantless Search Was Not Made Below.....	11
Conclusion.....	13

TABLE OF AUTHORITIES

Cases	Page
<u>Air Pollution Variance Bd. v. Western Alfalfa Corp.</u> (1974) 416 U.S. 861.....	6
<u>Care v. United States</u> , 231 F.2d 22 (C.A.10).....	7
<u>Hester v. United States</u> (1924) 265 U.S. 57.....	6
<u>Illinois v. Gates</u> (1982) 462 U.S. 213.....	11, 12
<u>NORML v. Mullen</u> , ___ F.Supp. ___ (No. 83-4037 RPA, N.D.Ca. 1985).....	9, 10
<u>Oliver v. United States</u> (1984) 466 U.S. ___, 80 L.Ed.2d 214.....	2, 6, 9
<u>People v. Cook</u> , Crim. No. 23651.....	12
<u>People v. Mayoff</u> , Crim. No. 23608.....	12
<u>Segura v. United States</u> (1984) ___ U.S. ___, 82 L.Ed.2d 599.....	2, 12
<u>United States v. Bassford</u> , ___ F.Supp. ___ (D. Maine 1985).....	9
<u>United States v. Karo</u> (1984) 468 U.S. ___, 82 L.Ed.2d 530.....	10
<u>United States v. Leon</u> (1984) 468 U.S. ___, 82 L.Ed.2d 677.....	i, 5, 12
<u>United States v. Van Dyke</u> , 643 F.2d 992 (C.A.4 1981).....	6
<u>United States v. Williams</u> , 581 F.2d 451 (C.A.5 1978).....	7
<u>Wong Sun v. United States</u> (1963) 371 U.S. 471.....	2, 12
Constitution	
United States Constitution Amendment IV.....	1, 4, 5, 6, 8, 9, 10, 11, 12, 13
Statute	
42 U.S.C. § 1983.....	9
Miscellaneous	
4 Blackstone, Commentaries, *225.....	6

No. 84-1513

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.
DANTE CARLO CIRAULO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

Respondent respectfully submits the Petition should be
denied for the reasons stated below.

OPINION BELOW

The opinion of the California Court of Appeal is
reported at 161 Cal.App.2d 1081, 208 Cal.Rptr. 93.

JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C.
§ 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in
their persons, houses, papers, and ef-
fects, against unreasonable searches and
seizures, shall not be violated and no
warrants shall issue, but upon probable
cause, supported by oath or affirmation,
and particularly describing the place to
be searched, and the persons or things to
be seized.

STATEMENT OF THE CASE

Respondent's 1983 conviction for marijuana cultivation arose out of a negotiated guilty plea following an unsuccessful motion to suppress all evidence obtained as the fruits of what respondent believed was an unconstitutional aerial search of his enclosed urban residential curtilage. A charge of selling a quarter ounce of marijuana was dismissed as part of the plea bargain. Under California law, this issue is preserved for appeal despite the guilty plea.

Relying on Oliver v. United States (1984) 466 U.S. ___, 80 L.Ed.2d 214, Wong Sun v. United States (1963) 371 U.S. 471 and Segura v. United States (1984) ___ U.S. ___, 82 L.Ed.2d 599, among other Supreme Court authority, the California Court of Appeal found that the case at bar involved a "direct and unauthorized intrusion into the sanctity of the home," and reversed respondent's conviction. (Petition, Appendix A (hereafter "P-A") p. 19.

The State's petitions for rehearing in the Court of Appeal and hearing in the California Supreme Court were denied.

STATEMENT OF FACTS

An anonymous phone message reading, "[C]an see grass growing in yard, Stebbins by Clark, S/B on left" was received by Santa Clara City Police narcotics officer John Shutz (hereafter Shutz) on September 2, 1982. (CT 11, 36, 37).¹ Responding to this message, Shutz went to the area, located in a residential tract among the streets of the City of Santa Clara. (CT 14). Having chosen as a suspect home the particular house located at 2085 Clark Avenue, Shutz investigated on foot the residence of

¹ "CT" refers to the Clerk's Transcript on Appeal.

respondent Dante Carlo Ciruolo, who lives there with his family. (CT 15; 37-38, 99). Officer Shutz was unable to see any marijuana from his ground-level view. (CT 38). He could see only another fence within the home's backyard. (CT 15, 38, 43). The inner area was enclosed by a fifteen-foot wide standard fence about six feet tall, which is attached to the house. (CT 38). Its height was elevated an additional few feet by bamboo stakes in the inner area. (CT 38, 44). In all, the inner fence line was approximately ten feet high. (CT 15, 44). The inner yard contained a swimming pool where the family expected privacy.² Later that day, Shutz chartered an airplane for the specific purpose of observing and photographing respondent's residence and its adjacent fenced yard. (CT 11-12, 38).

According to Shutz, the aerial surveillance and photography of Ciruolo's home and yard were conducted at an altitude of at least 1,000 feet. (CT 12-13, 38). From the air, no visual aids were used. (CT 12). However, Shutz stated that from that distance, he was able to see "a green colored residence with surrounding fenced property" within which was an interior fenced yard measuring approximately 15 x 25 feet. (CT 38:11-17). He said he could see full marijuana plants about 8-10 feet tall growing inside the interior fenced area. (CT 40, 14:13-22; 38:11-19). Shutz observed Ciruolo's house, his side yard and backyard. (CT 14-15).³

² Testimony regarding the family's use of the pool was erroneously excluded by the trial court. (RT 4-12). ["RT" refers to the Reporter's Transcript of the suppression hearing of August 15, 1983.] Ciruolo complained of this exclusion on appeal.

³ Petitioner's notation that other aircraft were in the area using the San Jose Airport is misleading. (Petition, 6). The State never argued that respondent had a diminished expectation of backyard privacy for this reason. In any event, it was not established that such aircraft contained persons who could or did peer into respondent's backyard.

After the aerial search, Shutz sought a search warrant for the Ciruolo residence, alleging the belief that it contained marijuana and related items of contraband based on his experience, his observations and conclusions regarding the Ciruolo property, and the conclusions of Narcotics Task Force Agent R. Rodriguez, who had accompanied Shutz on his aerial mission. (CT 36-40). The requested warrant issued, and its execution yielded marijuana growing within the inner fence of the Ciruolo backyard. (CT 6, 34-35).

At the hearing on Ciruolo's suppression motion, the prosecution maintained simply that the directed aerial surveillance was lawful because it was conducted 1,000 feet over the residence without the use of binoculars. (CT 43-48; RT 11).⁴ Respondent's motion to suppress the evidence against him was denied without opinion. (CT 72, 81). The California Court of Appeal reversed, finding that by any standard, Ciruolo had a reasonable expectation of privacy in the curtilage of his home and that the police conduct in issue was an unreasonable violation of that privacy, requiring suppression under the Fourth Amendment.⁵

REASONS FOR DENYING THE WRIT

Summary of Argument

The California Court of Appeal correctly ruled that the particular aerial observation in the case at bar was a violation of respondent's Fourth Amendment protection against unreasonable

⁴ There was no suggestion in the trial court that a good faith exception should be made so that the evidence gathered illegally could be used to support a search warrant. This argument was raised by the California Court of Appeal on its own motion and briefed in that court at the invitation of the Court. P-A 4.

⁵ Since no warrant was sought to make the aerial search of the curtilage, the court below had no occasion to decide whether there was probable cause for that search.

governmental intrusions upon his right to residential privacy. This decision is consistent with the recent decisions of this Court and should only be reviewed if this Court may wish to rule that under no circumstances do persons here have a right to privacy against aerial spying into their homes.

Relying on long-established principles of law protecting the curtilage from warrantless visual intrusions, the court below properly applied the exclusionary rule to the fruits of illegal police conduct. It is undisputed that the instant matter involved the particularized, deliberate, aerial circumvention of an otherwise enclosed, visually impermeable area intimately associated with Ciruolo's home, based on nothing more than a nonspecific anonymous tip.

Consequently, the California Court of Appeal opinion in no way conflicts with other cases holding that open areas were lawfully viewed or with cases holding that evidence obtained by plain view without attempting to invade privacy is not subject to the exclusionary rule.

Petitioner's attempt to equate illegally obtained probable cause with a dispute over the sufficiency of probable cause as involved in Leon^{5a} must also fail. If there were no penalty for illegally obtaining the very facts relied upon to procure a warrant, there would be, contrary to Leon, no sanction for violations of the Fourth Amendment. Moreover, petitioner failed to properly raise or preserve the issue of good faith reliance on the magistrate's probable cause determination, thus preventing a factual hearing and waiving its right to raise it now.

^{5a} United States v. Leon (1984) 468 U.S. ___, 82 L.Ed.2d 677.

ARGUMENT

1. This Court Both Historically And Very Recently Has Treated The Curtilage Of A Home With The Same Protection As The Interior Of The Home For Fourth Amendment Purposes.

The Attorney General of California seeks to have this Court reexamine what was just decided in Oliver v. United States (1984) 466 U.S. ___, 80 L.Ed.2d 214, namely that when it comes to Fourth Amendment protection of privacy and security the curtilage of one's home has the same protection as its interior. This Court stated in Oliver:

. . . An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. [80 L.Ed.2d at 224.]

The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home The curtilage . . . has been considered part of home itself for Fourth Amendment purposes. [80 L.Ed.2d at 225.]

Although there were concurring and dissenting opinions in Oliver, they do not take issue with creating no distinction between the interior of the home and the curtilage when it comes to Fourth Amendment protections. Thus the Court is now unanimous in this view.

The equivalency of the curtilage with the home is not a fragile new development subject to re-examination when viewed in a fresh light, but historically well-established in Blackstone.⁶ Hester v. United States (1924) 265 U.S. 57, Air Pollution Variance Bd. v. Western Alfalfa Corp. (1974) 416 U.S. 861, 865; and see United States v. Van Dyke, 643 F.2d 992, 993-994 (C.A.4

⁶ See 4 Blackstone, Commentaries, *225.

1981), United States v. Williams, 581 F.2d 451, 453 (C.A.5 1978), Care v. United States, 231 F.2d 22, 25 (C.A.10).

The Petition now before the Court gives little reason for re-examining this established doctrine except that the Attorney General of California does not wish to comply with the current and historical demands of the United States Constitution in carrying out law enforcement tasks. There is no question in this case that, however narrowly or broadly the term "curtilage" might be defined, the contraband in this case was next to respondent's home and within the curtilage.

The really significant question which the Petition raises only obscurely is why should aerial surveillance be treated differently than patrol car surveillance by the police from the ground level? If we assume that the police on strongly-founded information have probable cause to believe that illegal marijuana is growing in the curtilage of a home, why should there be a distinction between a viewing of that marijuana from a patrol car on a public street (a "plain view") and a viewing of that same marijuana from the air when it was protected from "plain view" from the street by a high fence? Whether such a distinction has merit is the subject of the next section of this response.

2. The Fourth Amendment Provides Protection Against Aerial Invasions Of The Home And Curtilage From Purposeful Invasion.

This case involves a warrantless focused scrutiny on defendant's home from the air. It does not involve aerial observations by happenstance or through routine patrol. This case is thus the broadest-gauge attack possible on the Warrant Requirement for one's effects which are not under an opaque roof or out

of sight of the home's windows or skylights.⁷ The petitioner would treat aerial spying on a home in the same manner as spying on a home from a public street.

But the airspace above one's home is not a public street. It is more analogous to the territorial seas where the right of innocent passage is allowed but when the purpose of the passage is to invade the sovereign interests of the territorial state, the passage is no longer "innocent" under international law. If the expectation of privacy which our citizens reasonably have for their homes and yards is to be invaded from the air by reason of a focused suspicion of crime, that invasion must be authorized by a magistrate to comply with the Fourth Amendment.

It is apparent that the kind of carte blanche sought by the government in this Petition is neither necessary to effective law enforcement nor compatible with a healthy society. If our citizens can obtain privacy within the curtilage only by constructing both a fence opaque to horizontal viewing and a roof opaque to vertical viewing then the price of the Fourth Amendment protections so long fought for by our people prior to the adoption of the Bill of Rights and so long protected by this Court will be a deprivation of sunlight, an unacceptable price in pure human terms.

If the petitioner's position is accepted and there is no protection from focused scrutiny by aerial surveillance of any effects within the home or curtilage which could possibly be seen from the air, then it is hard to find any basis for denying the

⁷ True, petitioner does seek to concede that some kind of protection should apply for police flying outside of navigable airspace or "in a physically non intrusive manner" (Petition, pp. 18-19), but these are vague definitions not addressed by the court below. In any event, what is "physically non intrusive" should be decided by a magistrate in advance of any intrusion by placing conditions on the execution of a warrant allowing for aerial surveillance.

overseers the right to high-powered gyroscopic binoculars and advanced optics photography to allow a detailed and leisurely scrutiny of whatever comes into view from the air.⁸ There are many answers to a parade of horrors but the argument seems justified in the context of this case.

The warrant requirement is a simple and effective means to prevent the parade of horrors from getting out of control as a magistrate could limit the kind and intensity of aerial surveillance undertaken on probable cause. Backyard privacy could be protected by the magistrate where practicable. This is certainly a more effective method of controlling abuses of aerial surveillance than the injunction remedy pursuant to a 42 U.S.C. § 1983 action such as was required to control gross abuses of privacy by helicopters allegedly searching for marijuana described by the District Court in NORML v. Mullen, ___ F.Supp. ___ (No. 83-4037 RPA, N.D.Ca. 1985).

Citing a District Court opinion in United States v. Bassford, ___ F.Supp. ___ (D. Maine 1985) the petitioner asserts that distinguishing between curtilage areas and non curtilage areas from the air is impracticable (Petition, p. 15) and does not provide "meaningful guidance to police" (Petition, p. 16). How strange it is that the petitioner overlooks footnote 12 in Oliver v. United States, supra, which deals with this issue swiftly and decisively:

The clarity of the open fields doctrine that we reaffirm today is not sacrificed, as the dissent suggests, by our recognition that the curtilage remains within the protections of the Fourth Amendment. Most of the many millions of acres that are "open fields" are not close to any structure and so not arguably within the

⁸ See Dow Chemical Co. v. United States (6th Cir. 1984) 749 F.2d 307, Petition For Cert. pending, No. 84-1259.

curtilage. And for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage--as the area around the home to which the activity of home life extends--is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment advocated by the dissent. [80 L.Ed.2d at 226.]

Lastly, petitioner argues that the intrusion from aerial surveillance into one's home and curtilage is hardly noticeable and hardly worth the attention of the Fourth Amendment. Even if our case does involve the "obnoxious thing in its most palatable form", this Court has recently considered and rejected the excuse that it is only a little Fourth Amendment violation in United States v. Karo (1984) 468 U.S. ___, 82 L.Ed.2d 530. In that case the warrantless monitoring of a surveillance device that was brought into a home was found to be a transmittal of information about what was in that home and therefore to be a violation of the Fourth Amendment subject to the exclusionary rule. The court below ruled in a parallel manner that the warrantless obtaining of information by a focused invasion of the curtilage could not be used as the sole basis for a search warrant. This Court pointed out in Karo that the government could not have made a warrantless entry into the defendant's home to verify the presence of the chemical being monitored in that home and then use that information to obtain a search warrant. Therefore, the electronic monitoring was also a Fourth Amendment violation. In our case the government cannot jump the fence and enter respondent's curtilage for the purpose of obtaining a view of the marijuana garden and then use that view as the basis for its search warrant affidavit. As the District Court wrote in NORML v. Mullen, *supra*, "just as a [government] agent on

the ground cannot on a whim climb a fence to peer into a house otherwise protected from his view, a [government] helicopter cannot randomly position itself over a home to leisurely contemplate the scene below."

3. This Is Not The Case To Decide Whether United States v. Leon Applies To Warrantless Searches Because A Record On The "Good Faith" Of The Officer In Making The Warrantless Search Was Not Made Below.

Certainly, and perhaps soon, this Court will decide the issue of whether the exclusionary rule should apply when a policeman in objectively reasonable good faith believed that he had the right to make a warrantless search but it is later determined that he had no such right. To decide this question the issue (1) should have been raised in the fact-gathering court and (2) should be decided on testimony establishing the objective good faith of the officer who inadvertently violates the Fourth Amendment. In our case, neither condition is present.

The good faith issue was raised for the first time by the California Court of Appeal on its own motion. See P-A, p. 4. As in Illinois v. Gates (1983) 462 U.S. 213, and for the reasons stated there at length, there is at least a prudential, if not a jurisdictional, objection to considering points from state courts not properly raised below. If these impediments to certiorari review are not availing then we would add that (3) the airborne police should have known that under California law the legality of their surreptitious surveillance was, at the least, an open issue, and (4) this Court's recent Segura decision condemns the "indirect products of unconstitutional conduct" without regard to the good faith of the searching officer.

The fact is, as stated above, the law in this country has long protected the curtilage and the home from warrantless invasions of privacy and security and few, if any, cases hold

that there is no Fourth Amendment protection from aerial surveillance. Whether the officer who flew over respondent's home to verify the information given him before he applied for a search warrant knew that the curtilage was protected by the Fourth Amendment is the subject of factual investigation not yet undertaken. Moreover, the entire issue of aerial surveillance to obtain information of criminal violations is still being litigated under California law and the California Supreme Court now has two cases involving this issue before it which were argued in September of 1984 and remain undecided. People v. Mayoff, Crim. No. 23608 and People v. Cook, Crim. No. 23651.

Petitioner is faced with still another problem in seeking review in that only last Term this Court decided Segura v. United States (1984) ___ U.S. ___, 82 L.Ed.2d 599. That case, as discussed in the California Court of Appeal, reaffirmed the "fruit of the poisonous tree" doctrine which was applied in its full vigor in Wong Sun v. United States (1963) 371 U.S. 471, a case cited with approval in Segura, supra. To extend the United States v. Leon decision to authorize illegal warrantless searches as the basis for search warrant applications would directly destroy the Wong Sun doctrine and conflict with Segura. Moreover, it would encourage illegal warrantless searches rather than encouraging warranted searches which is at the heart of this Court's reasoning in Illinois v. Gates, supra, and United States v. Leon, supra.

If the petitioner is correct in his argument that the "good faith exception" should apply both to warranted and warrantless searches so that a warrant would be valid so long as issued by a magistrate, whether or not the information obtained for the affidavit was legally obtained, then there would be no point in obeying the Fourth Amendment. Certainly the magistrate

viewing the affidavit in an ex parte setting without hearing or argument is in no position to rule on the legality of the police actions. Nor would the magistrate ordinarily make such a ruling on the affidavit alone. The decision on legality vel non is to be made in an adversary setting after the warrant has been executed.

CONCLUSION

This is not an appropriate case to measure the scope of Fourth Amendment rights in the context of airplane overflights. Its facts are the least appealing of the uses of airplane overflights because the spying was intentional and focused on petitioner and thus called for the neutral intervention of a magistrate's judgment. The issue of "good faith" was not properly raised or tried below and the exception claimed is so broad that it would eliminate any effective remedy for Fourth Amendment violations.

For these reasons, the Petition should be denied.

May 10, 1985

Respectfully submitted,

MARSHALL W. KRAUSE,
KRAUSE, BASKIN, SHELL, GRANT & BALLENTINE
PAMELA DUNCAN

By Marshall W. Krause
MARSHALL W. KRAUSE
Attorneys for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984
No. 84-1513

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

PROOF OF SERVICE

MARSHALL W. KRAUSE, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 207 Wood Island, 60 E. Sir Francis Drake Blvd., Larkspur, California 94939; that on May 10, 1985 true copies of the attached MOTION FOR LEAVE TO

PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF AND RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT in the above-entitled matter were served on counsel of record by placing same in an envelope addressed as follows:

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Said envelopes were then sealed and deposited in the United States Mail at Larkspur, California with first class postage thereon fully prepaid.

Marshall W. Krause
MARSHALL W. KRAUSE
Counsel for Respondent

Dated: May 10, 1985

Subscribed and Sworn to Before Me
this 10th day of May, 1985.

Sally Moore
NOTARY PUBLIC



(3)
No. 84-1513

Office - Supreme Court, U.S.

FILED

MAY 26 1985

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

v.

DANTE CARLO CIRAULO,
Respondent.

PETITIONER'S REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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1298

TOPICAL INDEXPAGE

ARGUMENTS

- I. CIRAOLO'S ARGUMENT
REFLECTS THE DISHARMONY
OF THE CALIFORNIA
COURT'S DECISION WITH
THIS COURT'S CASES AND
REINFORCES THE URGENT
NEED FOR RESOLUTION
OF THE NATIONALLY
IMPORTANT ISSUE OF
AERIAL OBSERVATION

1

- II. THE STATE COURT
PROCEEDINGS CONTAIN A
FULLY DEVELOPED RECORD
ON THE GOOD FAITH ISSUE
BRIEFED IN AND DECIDED
ON THE MERITS BY THE
CALIFORNIA COURT OF
APPEAL

5

CONCLUSION

9

TABLE OF CASES

	<u>PAGE</u>
<u>Illinois v. Gates</u> 462 U.S. 213 (1983)	7
<u>In re Lance W.</u> 37 Cal.3d 873, 210 Cal.Rptr. 631 694 P.2d 744, mod. 38 Cal.3d 412a Cal.Rptr. P.2d (1985)	4
<u>Jenkins v. Georgia</u> 418 U.S. 153 (1974)	6
<u>NORML v. Mullen</u> F.Supp. (No. 83-4037 RPA) (N.D. Cal. 1985)	3
<u>NORML v. Mullen</u> No. 85-1883 (9th Cir. 1985)	3
<u>People v. Smith</u> 34 Cal.3d 251, 193 Cal.Rptr. 692, 667 P.2d 149 (1983)	4
<u>People v. Teresinski</u> 30 Cal.3d 822, 180 Cal.Rptr. 617 640 P.2d 753 (1982)	7
<u>Texas v. Brown</u> 460 U.S. 730 (1983)	2
<u>United States v. Bassford</u> 601 F.Supp. 1324 (D. Maine 1985)	2

TABLE OF CASES
(Continued)

	<u>PAGE</u>
<u>United States v. Hendricks</u> 743 F.2d 653 (9th Cir. 1984) cert. denied, U.S. ____ 84 L.Ed.2d 382 105 S.Ct. 1362 (1985)	8
<u>United States v. Knotts</u> 460 U.S. 276 (1983)	2
<u>United States v. Lee</u> 274 U.S. 559 (1927)	2
<u>United States v. Leon</u> 468 U.S. ____, 82 L.Ed.2d 677 104 S.Ct. 3405 (1984)	5
<u>United States v. Ross</u> 456 U.S. 798 (1982)	2
<u>United States v. Sager</u> 743 F.2d 1261 (8th Cir. 1984) cert. denied, U.S. ____ 84 L.Ed.2d 341 105 S.Ct. 1196 (1985)	8

TEXTS, STATUTES & AUTHORITIES

<u>Cal. Const.</u> Art. I, § 28(d)	4
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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

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Respondent.

PETITIONER'S REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I

CIRAOLLO'S ARGUMENT REFLECTS THE
DISHARMONY OF THE CALIFORNIA
COURT'S DECISION WITH THIS
COURT'S CASES AND REINFORCES
THE URGENT NEED FOR RESOLUTION OF
THE NATIONALLY IMPORTANT ISSUE OF
AERIAL OBSERVATION

Respondent Ciraolo fails to
reconcile the California Court of
Appeal's judgment with such cases as

United States v. Bassford, 601 F.Supp. 1324 (D. Maine 1985) cited in the petition. Indeed, he cannot. He merely renders explicit that implicit in the decision: a holding that police cannot intentionally change their position to see into a repository for contraband that the possessor knowingly exposed to view by the public. Respondent's illumination reinforces the need for plenary review by highlighting the disharmony between the California judgment and this Court's Fourth Amendment privacy principles. (See, e.g., Texas v. Brown, 460 U.S. 730, 740 (1983); United States v. Knotts, 460 U.S. 276, 282 (1983); United States v. Ross, 456 U.S. 798, 822-823 (1982); United States v. Lee, 274 U.S. 559, 563 (1927).)

Two matters noted by respondent may, however, mistakenly lead this Court to underestimate the need for review. First,

the preliminary injunction granted in NORML v. Mullen, ___ F.Supp. ___ (No. 83-4037 RPA) (N.D. Cal. 1985) has recently been modified by the Court of Appeals for the Ninth Circuit on its understanding that the District Court meant only to enjoin deliberately low helicopter flights over private residences. The modification enjoins "deliberate, knowing and intentional helicopter flights under 500 feet over residential structures, persons and vehicles." (NORML v. Mullen, No. 85-1883 (9th Cir. 1985) [Order of April 19, 1985, granting emergency motion in part].) If review is denied, California will be precluded by the state judgment from making aerial observations authorized by the federal injunction.

Second, the California Supreme Court overflight cases cited by respondent (Opp. 12) are but two of nine

4.

pending cases which, unlike this case, involve offenses committed prior to June 9, 1982. Effective that day, the People added, by initiative, article I, section 28(d) to the California Constitution, precluding reliance on state search and seizure law to suppress evidence of offenses committed after that date. (In re Lance W., 37 Cal.3d 873, 210 Cal.Rptr. 631, 694 P.2d 744, mod. 38 Cal.3d 412a, ___ Cal.Rptr. ___, ___ P.2d ___ (1985); see People v. Smith, 34 Cal.3d 251, 193 Cal.Rptr. 692, 667 P.2d 149 (1983).) Plenary resolution now by this Court of the federal issue must govern the California Supreme Court, but that court's rendition of state law cannot affect this case or future cases.

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5.

II

THE STATE COURT PROCEEDINGS CONTAIN A FULLY DEVELOPED RECORD ON THE GOOD FAITH ISSUE BRIEFED IN AND DECIDED ON THE MERITS BY THE CALIFORNIA COURT OF APPEAL

Respondent Ciruolo perceives the good faith issue to be "[w]hether the officer who flew over respondent's home . . . knew that the curtilage was protected by the Fourth Amendment" (Opp. 12). Expanding application of United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) to warrantless searches, he argues, should require testimony on good faith in the trial court as a prudential predicate.^{1/}

Respondent's fallacy is that the officer's good faith in conducting the overflight is not the issue. As framed

1. Respondent cannot and does not challenge the jurisdiction of this Court. (See, Jenkins v. Georgia, 418 U.S. 153, 157 (1974).)

by the petition and decided by the California court, it is whether Leon has facial application to a judicial warrant based on probable cause, subsequently deemed the product of an illegal search, fully disclosed to the issuing magistrate.

The record in this case contains all facts pertinent to the issue: (1) a search warrant affidavit detailing the overflight operation so that all information cited by the California Court of Appeal as indicative of its purported illegality was disclosed to the magistrate (CT 36-40), (2) a search warrant based on that information (CT 34-35), and (3) evidence seized pursuant to the warrant (CT 5-6, 8, 17), all three of which were before the state trial court at the suppression hearing (RT [Aug. 15, 1983]:4-5). The decisional law at the time of the warrant is, of course, judicially noticeable.

Reasoned application, not expansion, of Leon is sought. No prudential reason exists to defer it. Moreover, it would be grossly unfair to deny California review on the asserted ground. Leon did not exist at the time of respondent's conviction. Testimony by the officer on good faith is not only extraneous to the question decided by the California court, it was almost certainly inadmissibly irrelevant in the trial court absent any good faith doctrine. (See, Illinois v. Gates, 462 U.S. 213 (1983); People v. Teresinski, 30 Cal.3d 822, 831, fn. 6, 180 Cal.Rptr. 617, 622, fn. 6, 640 P.2d 753, 758, fn. 6 (1982))

The question is one of law, not dependent on the officer's state of mind or legal knowledge. Indeed, Leon eschews the very inquiry suggested as a misallocation of judicial resources.

(United States v. Leon, supra, 468 U.S. at ___, 82 L.Ed.2d at 698, fn. 23, 104 S.Ct. at 3421, fn. 23.) Review, under Leon, should not be refused due to the absence of the unnecessary. (United States v. Hendricks, 743 F.2d 653, 656 (9th Cir. (1984), cert. denied, ___ U.S. ___, 84 L.Ed.2d 382, 105 S.Ct. 1362 (1985); United States v. Sager, 743 F.2d 1261, 1265-1266 (8th Cir. 1984), cert. denied, ___ U.S. ___, 84 L.Ed.2d 341, 105 S.Ct. 1196 (1985).)

Respondent's reliance on Illinois v. Gates, supra, 462 U.S. 213 is misplaced. In Gates, the State of Illinois never raised modification of the exclusionary rule in the state courts and none considered it. This Court anticipated that testimony on subjective good faith might be significant. Those considerations are absent here. Instead, it is the California court's grudging interpretation

of Leon which controls and requires review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: May 16, 1985

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EUGENE W. KASTER
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CERTIFICATE OF SERVICE BY MAIL

PEOPLE OF THE STATE OF)	
CALIFORNIA,)	
)	
Petitioner,)	
)	
v.)	No. 84-1513
)	
DANTE CARLO CIRAOLO,)	
)	
Respondent.)	
<hr/>		

State of California)
)
City and County of)
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LAURENCE K. SULLIVAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on May 16 , 1985 true copies of the attached Petitioner's Reply to Opposition to Petition for Writ of Certiorari in the above-entitled matter were served on counsel of record by

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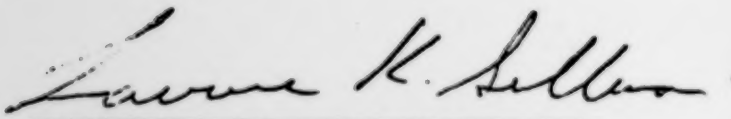
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LAURENCE K. SULLIVAN
Deputy Attorney General

Dated: May 16, 1985


(NOTARY PUBLIC)

Notary Public in and for the State of California, City and County of San Francisco, personally appeared LAURENCE K. SULLIVAN, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.



(8) **COPY**
No. 84-1513

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

Office-Supreme Court, U.S.
FILED

MAY 10 1985

ALEXANDER L. STEVAS,
CLERK

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAULO,

Respondent.

On Writ of Certiorari To The
California Court of Appeal
First Appellate District

BRIEF OF AMICUS CURIAE ON
BEHALF OF THE PETITIONER

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32 pp

TOPICAL INDEX

	<u>Pages</u>
BRIEF OF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	2-4
SUMMARY OF ARGUMENT	4-6
ARGUMENT	
THE CONSTITUTIONAL PERAMETERS OF OVERFLIGHT OBSERVATION OF THE CURTILAGE OF A DWELLING NEED TO BE SPEEDILY RESOLVED BY THIS COURT TO STEM THE RISING TIDE OF CONFLICTING LOWER COURT OPINIONS WHICH ARE IN TURN CAUSING CONFUSION EACH SUMMER AMONG OFFICERS ASSIGNED TO THE NATIONWIDE EFFORT TO ERADICATE MARIJUANA	6-8
ONE WHO MAKES NO REASONABLE ATTEMPT TO CONCEAL HIS MARIJUANA CROP FROM ORDINARY AERIAL OBSERVATION DOES NOT EXHIBIT AN EXPECTATION OF PRIVACY FROM ORDINARY AERIAL OBSERVATION BY POLICE WHICH SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE	8-14
ASSUMING THAT THE AERIAL OVERFLIGHT DURING WHICH MARIJUANA WAS OBSERVED WITH THE NAKED EYE WAS A SEARCH, IT WAS NOT UNREASONABLE	14-17

WHEN A MAGISTRATE ISSUES A
 SEARCH WARRANT BASED ON CONDUCT
 BOTH THE MAGISTRATE AND THE
 AFFIANT REASONABLY DEEM TO BE
 LAWFUL, THE EXCLUSIONARY RULE
 DOES NOT BAR USE OF THE EVIDENCE
 SEIZED WHEN AN APPELLATE COURT,
 IN A CASE OF APPARENT FIRST
 IMPRESSION, LATER DEEMS THAT
 CONDUCT UNLAWFUL

17-20

CONCLUSION

21

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
Air Pollution Variance Board v. Western Alfalfa (1974) 416 U.S. 861, 865 40 L.Ed. 2d 607	8
Katz v. United States (1967) 389 U.S. 347, 19 L.Ed. 2d 576	13
Oliver v. United States (1984) 466 U.S. _____, 80 L.Ed. 2d 214, 255, fn. 11	4,6,7,10
People v. Ciruolo (1984) 161 Cal. App. 3d 1081, 1089-1090	8,9
People v. Joubert (1981) 118 Cal. App. 3d 637, 640-648	11,20
People v. Superior Court (Stroud) (1974) 37 Cal. App. 3d 836	10,20
State v. Davis (Ore. App. 1981) 627 P.2d 492, pet. den. 634 P.2d 1346	20
State v. Lashmelt 71 Ill. App. 3d 429 389 N.E. 2d 888 (1979)	10
State v. Stachler (Haw. 1977) 570 P.2d 1323	20

Terry v. Ohio (1968) 392 U.S. 1 20 L.Ed. 2d 889	16,17
Tuttle v. Superior Court (1981) 120 Cal. App. 3d 320	20
United States v. Allen (9th Cir. 1980) 675 F.2d 1373, 1380	9
United States v. Bassford (D. Maine 1985) 601 F. Supp. 1324, 1330	7,8,11,12
United States v. DeBacker (WD Mich. 1980) 493 F. Supp. 1078	20
United States v. Kim (D. Hawaii 1976) 415 F. Supp. 1252	13
United States v. Knotts (1983) 460 U.S. 276, 283-284 75 L.Ed. 2d 55	13
United States v. Leon (1984) 468 U.S. _____ 82 L.Ed. 2d at 689	18,19,20

Court of Appeal

161 Cal. App. 3d at 1090	15
161 Cal. App. 3d at 1087, fn. 3	15
161 Cal. App. 3d at 1085	17

Rules

United States Supreme Court Rule 36(1)	1
United States Supreme Court Rule 36(4)	4

Miscellaneous

Kay, Aerial Surveillance: Public Verses Private Expectations 56 Cal. State Bar Jn. 258 (1981)	14
McClung, Lawlessness Worst in Denny Area (Sacramento Bee, July 22, 1982)	3
1, La Fave, Search and Seizure, A Treatise On The Fourth Amendment, §1.1(a)	8
United States Department of Justice, Final Report, 1984, Domestic Cannabis Eradication/Suppression Program	3
Warrantless Aerial Surveillance: A Constitutional Analysis, 35 Van. L.R. 409, 431-433 (1982)	9

No. 84-1513

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

On Writ of Certiorari To The
California Court of Appeal
First Appellate District

BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate

Committee of the California District
Attorneys Association and John H.

Darlington, District Attorney of Nevada
County, are filing this brief accompanied
by written consent of all parties to the
case pursuant to Supreme Court Rule 36(1).^{1/}

1. Letters of consent are enclosed
with this brief.

INTEREST OF AMICUS CURIAE

The Appellate Committee of
the California District Attorneys
Association is a committee created by
the District Attorneys of California
to utilize and coordinate the
resources of District Attorneys'
offices throughout the state, for the
purpose of presenting their views on
behalf of the People of the State of
California in cases which may have
major statewide impact upon the
prosecution of criminal offenses.

The successful detection,
apprehension and prosecution of marijuana
cultivators is a significant task of the
offices whose members comprise the
California District Attorneys Association.
Commercial marijuana cultivation is a
significant law enforcement problem in

many states in this Country, including California.^{2/} According to the "Final Report, 1984, Domestic Cannabis Eradication/Suppression Program", published in December of 1984 by the U.S. Department of Justice, Drug Enforcement Administration, Cannabis Investigations Section (at pp. 7-8), 3,802,927, cultivated marijuana plants were reported by law enforcement agencies in the 50 states as having been eradicated in 1984. An additional 9,178,283 wild marijuana plants were also reported eradicated.

Accordingly, the Committee has decided to move for leave of this Court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Nevada

2. See McClung, "Lawlessness Worst in Denny Area" (Sacramento Bee, July 22, 1982)

has been requested to prepare and submit this brief.^{3/} The District Attorney of the County of Nevada is an authorized law officer of the County, which is a political subdivision of the State of California (see Supreme Court Rule 36(4)).

This case gives this Court an opportunity to address an issue which it specifically deferred to a later time in Oliver v. United States (1984) 466 U.S. ____, 80 L.Ed. 2d 214, 225, fn. 11 [the scope of the curtilage exception to the open fields doctrine].

SUMMARY OF ARGUMENT

This brief urges this Court to grant certiorari to stem the growing tide of confusing and conflicting lower court decisions grappling with the Fourth Amendment's application to aerial

3. Assisted by the District Attorney of Los Angeles County.

overflights by police officers seeking to eradicate marijuana cultivation. We shall argue that a case-by-case analysis of these problems does not further the best interests of society, defendants or officers.

We shall ask this Court to hold that ordinary (naked-eye) aerial observation of marijuana from 1000 feet is not a search absent a reasonable effort to shield the crop from that type of aerial view, and that the location of the crop or the inadvertence of its discovery is irrelevant to the test we propose.

We will also argue that even if it is assumed for the sake of argument that the officer's view of Respondent's marijuana garden was a search, that "search" was not unreasonable within the meaning of the Fourth Amendment.

Finally, we will argue that exclusion of the evidence obtained with a search warrant is an improper sanction, assuming an unlawful search preceeded it, because the state of the law at the time and the issuance of a facially valid warrant would lead a reasonable officer to maintain a good-faith belief that his conduct was proper.

ARGUMENT

I

THE CONSTITUTIONAL PERAMETERS OF OVERFLIGHT OBSERVATION OF THE CURTILAGE OF A DWELLING NEED TO BE SPEEDILY RESOLVED BY THIS COURT TO STEM THE RISING TIDE OF CONFLICTING LOWER COURT OPINIONS WHICH ARE IN TURN CAUSING CONFUSION EACH SUMMER AMONG OFFICERS ASSIGNED TO THE NATIONWIDE EFFORT TO ERADICATE MARIJUANA

In Oliver v. United States, supra, 80 L.Ed. 2d at 226, this Court made a very critical policy statement regarding the Fourth Amendment and

"open fields":

"Nor would a case-by-case approach provide a workable accomodation between the needs of law enforcement and the interests protected by the Fourth Amendment."

At present, the lower courts are making a shambles of Fourth Amendment analysis concerning aerial overflights, because they insist on using the case-by-case approach condemned in Oliver. [ie., "Thus, rather than embracing a general rule courts have taken a case-by-case approach to the fourth amendment problems implicated by aerial surveillance." United States v. Bassford (D.Maine 1985) 601 F.Supp. 1324, 1330.] We urge this Court to unscramble the growing confusion in overflight cases by adopting the kind of clear guidelines espoused in Oliver. Compare

e.g., People v. Ciruolo (1984) 161 Cal. App. 3d 1081, 1089-1090 (the subject of this brief); United States v. Bassford, supra at 1330-1332.

II

ONE WHO MAKES NO REASONABLE ATTEMPT TO CONCEAL HIS MARIJUANA CROP FROM ORDINARY AERIAL OBSERVATION DOES NOT EXHIBIT AN EXPECTATION OF PRIVACY FROM ORDINARY AERIAL OBSERVATION BY POLICE WHICH SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE⁴

The great fear which primarily led to the enactment of the Fourth Amendment was the fear of governmental abuse of the privacy and sanctity of the individual. 1 La Fave, Search and Seizure, A Treatise On The Fourth Amendment, §1.1(a). Everyone recognizes the potential for governmental abuse

4. Such invasion of privacy is abstract and theoretical at best. See Air Pollution Variance Board v. Western Alfalfa (1974) 416 U.S. 861, 865. 70 L.Ed. 2d 607.

of individual liberties resulting from our rapidly expanding technology. And, like chicken-licken, some individuals decry that the sky will fall on us and we'll have to live under "opaque bubbles" if police officers are allowed to look at the grounds around our homes, even from altitudes frequented by our airborne neighbors. People v. Ciruolo, supra at 1090. See United States v. Allen (9th Cir. 1980) 675 F.2d 1373, 1380; "Warrantless Aerial Surveillance: A Constitutional Analysis" 35 Van. L.R. 409, 431-433 (1982). Amicus submits that this fear has led to and will continue to lead to an ad hoc extrapolation of confusing Fourth Amendment principles in overflight cases. Clearer guidelines must be drawn, because, just like the earth-bound officer, the airborne officer should not have to ". . . guess before

every [flight] whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded [but patently observable from reasonable altitudes] to establish a right of privacy." Oliver v. United States, supra, 80 L.Ed 2d at 226.

The test we propose is simple to state and, we believe, to apply: One who makes no reasonable effort to conceal his marijuana ^{5/} from ordinary aerial observation does not exhibit an expectation of privacy from ordinary aerial observation by police officers which society is prepared to recognize as reasonable. See

5. Or farm machinery [State v. Lashmelt, 71 Ill. App. 3d 429, 389 N.E. 2d 88 (1979)], or auto parts [People v. Superior Court (Stroud) (1974) 37 Cal. App. 3d 836]; etc.

United States v. Bassford, supra, 601 F. Supp. at 1330-1331; People v. Joubert (1981) 118 Cal. App. 3d 637, 640-648.

Thus, the height of a fence, a wall or a row of trees, the number of "no trespassing" signs, the distance of the house from a public road or any road, the existence of prior information, the demographics of the area, and the distance of the marijuana garden from the house are all irrelevant. The curtilage thus does not become a sanctuary for criminal enterprise judicially made invisible from ordinary aerial observation. As the court noted in Bassford, supra, at 1331-1332: "Thus, the inquiry is appropriately limited to whether there existed a reasonable expectation of privacy from aerial surveillance of an area, whether curtilage or noncurtilage (citation). [¶] Although Bassford may

well have hoped that planes passing overhead would be occupied by persons uninterested in his unusual farming location and his distinctive crop he could not reasonably expect that others, such as the police, would not fly over and take note. All of the plots . . . , including 'Plot #1', which was about ten feet from the house, were clearly and contemporaneously visible from the same aerial vantage point." (Emphasis added) The court also upheld an aerial observation, based on a subsequent informant's tip, of a single marijuana plot five feet from a nearby dwelling. Id. at 1334.

Amicus submits that the glaring disparity between the Fourth Amendment analysis in this case by the California Court of Appeal and by the court in Bassford is indicative of the conflict that currently needs resolution by this

Court. Further, our proposed analysis does not sanction clandestine surveillance [e.g. Katz v. United States (1967) 389 U.S. 347, 19 L.Ed. 2d 576]. It does not sanction telescopic surveillance of areas not visible to the naked eye [e.g., United States v. Kim (D. Hawaii 1976) 415 F. Supp. 1252]. It does not sanction protracted, intensive intrusions into areas or in ways not ordinarily utilized by ordinary people in their ordinary activities [See e.g., United States v. Knotts (1983) 460 U.S. 276, 283-284, 75 L.Ed.2d 55].

If a person does not want anyone to even casually observe any of his backyard activities, he may have to live under an opaque bubble. But as anyone who has flown in an aircraft knows, the intimate details of individual, earth-bound behavior cannot be readily

detected by casual observation from a moving aircraft at 1000 feet. It is the distinctive color of marijuana plants that catches the officer's gaze, not the domestic accoutrements (ie., pools, spas, cabanas, skylights, etc.) of the landowner.

Therefore, amicus submits that society is not prepared to recognize as opaque to the naked eye of an airborne policeman that which is readily observable to the naked but untrained eye of the ordinary airborne citizen. See Kay, Aerial Surveillance: Public Versus Private Expectations, 56 Cal. State Bar Jn. 258 (1981)

III

ASSUMING THAT THE AERIAL
OVERFLIGHT DURING WHICH
MARIJUANA WAS OBSERVED WITH
THE NAKED EYE WAS A SEARCH,
IT WAS NOT UNREASONABLE

Assuming for the sake of argument only that the aerial observation of Respondent's backyard was a search, amicus asks this Court to determine that the "search" was reasonable under the Fourth Amendment, contrary to the lower court's determination. (161 Cal. App. 3d at 1090) We realize this request involves the possibility of creating a new exception to the warrant requirement.

To begin with, it cannot be doubted that in this case, as in most overflight cases, the officers did not have probable cause to obtain a warrant before the overflight. That fact is admitted by the Court of Appeal in its opinion. (161 Cal. App. 3d at 1087, fn. 3) However, this Court has authorized limited intrusions, including searches, without a warrant where the societal interest in effective law enforcement was great when

balanced against the nonintrusive nature of the "search". See e.g., Terry v. Ohio (1968) 392 U.S. 1; 20 L.Ed.2d 889.

As this Court elaborated in Terry: "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches . . . But we deal here with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." (Emphasis added) Id. at 20.

In the case before this Court, Respondent's backyard was observed from the air during a brief pass at 1000 feet to confirm an anonymous tip that

marijuana was being grown there.

(161 Cal. App. 3d at 1085) The pivotal question, assuming it was a "search", is whether or not that intrusion was reasonable within the meaning of the Fourth Amendment. Examined in light of the principles set forth in Terry amicus submits that it was.

IV

WHEN A MAGISTRATE ISSUES A SEARCH WARRANT BASED ON CONDUCT BOTH THE MAGISTRATE AND THE AFFIANT REASONABLY DEEM TO BE LAWFUL, THE EXCLUSIONARY RULE DOES NOT BAR USE OF THE EVIDENCE SEIZED WHEN AN APPELLATE COURT, IN A CASE OF APPARENT FIRST IMPRESSION, LATER DEEMS THAT CONDUCT UNLAWFUL

In this case, Officer Shutz obtained a search warrant from a magistrate to search Respondent's yard. If the overflight preceding the warrant was legal, no issue of probable cause exists. The issue is whether or not the exclusionary rule should apply where a magistrate,

by signing the warrant, implicitly determines that the facts supporting probable cause have themselves been lawfully obtained, but an appellate court subsequently states a new proposition of law and concludes they were not lawfully obtained. Amicus submits that exclusion of evidence in such a case would not "efficaciously" serve the "remedial objectives" of the exclusionary rule. United States v. Leon (1984) 468 U.S. ____, 82 L.Ed. 2d at 689.

In Leon, this Court was faced with a situation where an officer gathered facts, the magistrate issued the warrant, and a subsequent court decision determined those facts to be inadequate to show probable cause. However, since the officer reasonably believed he had enough facts and the magistrate confirmed that belief by

issuing the warrant, this Court declined to apply the extreme sanction of exclusion.

In the present case, the officer has gathered the facts, the magistrate has issued the warrant and a subsequent decision of apparently first impression has determined that the process by which he gathered those facts violated the search clause of the Fourth Amendment. The lower court apparently found this distinction to differentiate the present case from Leon. We submit the distinction is without a difference.

The fact remains that the officer reasonably believed his overflight was proper, and so did the magistrate. A number of cases had held prior to September 2, 1982 (the date of the overflight) that a defendant reposed no

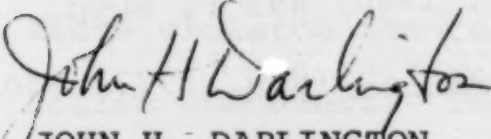
reasonable expectation of privacy in his criminal enterprise from intentional or inadvertent aerial observation. See e.g., State v. Davis (Ore. App. 1981) 627 P.2d 492, pet. den. 634 P.2d 1346; Tuttle v. Superior Court (1981) 120 Cal. App. 3d 320; People v. Joubert, supra, 118 Cal. App. 3d 637; United States v. DeBacker (WD Mich. 1980) 493 F. Supp. 1078; State v. Stachler (Haw. 1977) 570 P.2d 1323; People v. Superior Court (Stroud), supra, 37 Cal. App. 3d 836.

Two years later, the Court of Appeal has determined, on Fourth Amendment grounds, that what was considered to be a non-search was a warrantless search. We submit that exclusion of the evidence was not warranted. See Leon, supra at 695-699 and fn. 23.

CONCLUSION

For the foregoing reasons,
amicus submits that the petition should
 be granted and the decision of the Court
 of Appeal reversed.

Respectfully submitted on behalf of
 the Appellate Committee of the
 California District Attorney's
 Association


 JOHN H. DARLINGTON
 District Attorney of
 Nevada County

IRA REINER
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Attorneys for the California District
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DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA }
 } ss.
 COUNTY OF LOS ANGELES

I, the undersigned, hereby
 declare under penalty of perjury,
 that the following is true and
 correct:

I am a citizen of the
 United States, over eighteen years of
 age, not a party to the within cause
 and employed in the Office of the
 District Attorney of Los Angeles
 County, under the supervision of
 Harry B. Sondheim, Head, Appellate
 Division, a member of the bar of this
 court at whose direction the service
 was made, with principal offices
 located at 849 South Broadway,

Los Angeles, California 90014-3296; that
the District Attorney is the amicus
Curiae on behalf of the Petitioner in
the above-entitled matter. On
May 8, 1985, I served seven
copies of the foregoing on the
following persons and Courts by
depositing true copies thereof,
enclosed in a sealed envelope with
postage thereon fully prepaid in the
United States mail in the City of Los
Angeles in compliance with Supreme
Court Rule 28, paragraph three,
addressed as follows:

Clerk of the Court
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First Appellate District
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John K. Van De Kamp
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Attn: Laurence K. Sullivan

Executed on May 8, 1985
at Los Angeles, California

MYRA BAYMAN

DECLARATION OF SERVICE ON THE COURT
STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

The undersigned, Harry B. Sondheim, Head, Appellate Division, is a member of the bar of this Court. On May 8, 1985, under my supervision, Alan Yockelson, an employee of the Office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid and via U.S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543

HARRY B. SONDEHEIM

BEST AVAILABLE COPY

5
No. 84-1513

Office - Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVENS
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAULO,

Respondent.

On Writ Of Certiorari To
The California Court of Appeal,
First Appellate District

JOINT APPENDIX

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10 pp
addendum

INDEX TO JOINT APPENDIX

	<u>Page</u>
Chronological List of Relevant Docket Entries	1
Search Warrant	4
Search Warrant Affidavit	7
Preliminary Hearing Transcript	16
Information	43
Suppression Hearing Transcript	45
Order Denying Motion to Suppress	65
Notice of Appeal	66
Note Regarding The Judgment Of The California Court Of Appeal And Subsequent Orders	68

CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES

The People of the State of California

v.

Dante Carlo Ciraolo

Santa Clara County Municipal Court
No. D8231923

Santa Clara County Superior Court
No. 88043

California Court of Appeal (1st App.
Dist., Div. 5) No. A026048

Santa Clara County Municipal Court
No. D8231923

October 13, 1982 Felony Complaint
Filed

April 27, 1983 Preliminary
Examination

Santa Clara County Superior Court
No. 88043

May 9, 1983 Felony Information
Filed Plea Entered,
"Not Guilty"

July 12, 1983 Motion To Suppress
Evidence Filed

July 15, 1983 Motion to Suppress
Augmented With Search
Warrant and Search
Warrant Affidavits

2.

August 4, 1983	Opposition to Motion to Suppress Filed
August 8, 1983	Amended Felony Information Filed Plea Entered, "Not Guilty"
August 15, 1983	Hearing On Motion To Suppress Evidence
	Preliminary Hearing Transcript, Search Warrant and Search Warrant Affidavit Received In Evidence
	Motion Taken Under Submission
August 30, 1983	Order Denying Motion To Suppress Filed
October 4, 1983	Ciraolo Changes Plea To Guilty Of Marijuana Cultivation
November 9, 1983	Sentencing Probation Granted
December 20, 1983	Probation Order Filed
January 6, 1983	Notice Of Appeal Based Upon Denial Of Suppression Motion Filed

3.

	California Court of Appeal (1st App. Dist., Div. 5) No. A026048
April 17, 1984	Ciraolo Opening Brief Filed
May 23, 1984	California Brief Filed
June 12, 1984	Ciraolo Reply Brief Filed
July 31, 1984	Case Argued
November 20, 1984	Opinion and Judgment Filed Reversing Conviction
December 5, 1984	California Petition For Rehearing Filed
December 10, 1984	Order Denying Petition For Rehearing Filed
December 31, 1984	California's Petition For Hearing in California Supreme Court Filed
January 8, 1985	Ciraolo's Answer To Petition For Hearing Filed
January 23, 1985	California Supreme Court Denies Hearing Lucas, J. Dissents
March 26, 1985	Remittitur Issues

MUNICIPAL COURT OF
CALIFORNIA
SANTA CLARA COUNTY JUDICIAL
DISTRICT
SANTA CLARA FACILITY

FILED
DATE
SEP 21, 1982
[court stamp
illegible]

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA
To any Sheriff, Constable, Marshal,
Policeman or Peace Officer in the County
of Santa Clara:

Proof, by affidavit, having been made
before me this day by Detective John
Shutz that there is probable cause for
believing that evidence of the commission
of a felony, to wit: a violation of
California Health and Safety Code Section
11358 (CULTIVATION OF MARIJUANA), more
particularly described below, will be
located where described below.

You are therefore, commanded, in the
daytime or [Original Blank],
(Magistrate's initials)
to make search A one story house, wood/
stucco with attached garage, light green
in color with dark green trim located on
the north side of Clark Avenue at the
northeast corner of Clark Avenue and

Stebbins Avenue, bearing the numbers
2085 in four inch metal numbers against
the wood frame that borders the garage
door on the right, which includes all
rooms, attics, basements, storage areas,
yard or ground areas, and attached
garage to said dwelling.

located at 2085 Clark Avenue, Santa
Clara, County of Santa Clara, State of
California, for the following property:

1. MARIJUANA in any form;
2. Packaging and storage materials,
including but not limited to plastic
baggies, large plastic garbage bags,
scales other than bathroom scales,
and/or other weighing devices;
3. Proof of occupancy of the above
described premises including, but
not limited to, telephone bills,
utility bills, rent receipts and
other correspondence, as well as
keys;
4. Notes, records, customer lists, and
price lists, relating to the sales
of Marijuana;

[Exhibit stamp deleted in printing.]

5. Paraphernalia used in the
preparation of Marijuana for
ingestion and sale including, but
not limited to, screens and stem and
seed preparation boxes.

6.

And if you find the same or and part thereof, to hold such property in your possession under California Penal Code Section 1536.

Given under my hand this 8th day of September, 1982.

[Manuscript signature
deleted in printing.]
JUDGE OF THE MUNICIPAL COURT

[Seal omitted in printing.]

7.

MUNICIPAL COURT OF CALIFORNIA
SANTA CLARA COUNTY JUDICIAL DISTRICT
Santa Clara FACILITY

WARRANT #	[Court stamp
RECEIVED	illegible]
BY	FILED
ON 4-8-82	DATE <u>SEP 21, 1982</u>
[Manuscript signature deleted in printing.]	[Manuscript signature deleted in printing.]

STATE OF CALIFORNIA)	
	)	SS
COUNTY OF SANTA CLARA	)	<u>AFFIDAVIT IN</u>
		<u>SUPPORT OF</u>
		<u>SEARCH WARRANT</u>

Personally appeared before me this 8th day of September 1982, Detective John Shutz who, on oath, makes complaint, and deposes and says that there is just, probable and reasonable cause to believe, and that he does believe, that there is now in the possession of unknown persons, on the premises located at 2085 Clark Avenue, Santa Clara County of Santa Clara, which premises consist of: A one story house of wood and stucco construction. The house is painted light green with dark green trim

located on the north side of Clark Avenue at the northeast corner of Clark Avenue and Stebbins Avenue, bearing the numbers 2085 in four inch metal numbers against the wood frame that borders the garage door on the right, which includes all rooms, attics, basements, storage areas, yard or ground areas, and attached garage to said dwelling

personal property described as follows:

1. MARIJUANA in any form;
2. Packaging and storage materials, including but not limited to plastic baggies large plastic garbage bags, scales other than bathroom scales, and/or other weighing devices;
3. Proof of occupancy of the above described premises including, but not limited to, telephone bills, utility bills, rent receipts and other correspondence, as well as keys;
4. Notes, records, customer lists, and price lists, relating to the sales of Marijuana;
5. Paraphernalia used in the preparation of Marijuana for ingestion and sale including, but not limited to, screens and stem and seed preparation boxes.

Your affiant has been a police officer for eight years with the Santa Clara Police Department. For a period of approximately twenty months affiant has

been assigned to the Narcotics Division of said department. Affiant has attended narcotics investigation training courses provided by the Department of Justice [Exhibit stamp deleted in printing] State of California, San Jose State University Criminal Justice Department, and the regional Police Academy. In the course of his studies your affiant received instruction concerning Marijuana, its use and its preparation for use. Topics included identification, cultivation of Marijuana, smuggling (air and sea), and law enforcement eradication.

From an experience standpoint, your affiant has assisted the Santa Clara County Narcotics Task Force in Marijuana eradication efforts. He is familiar with rural and urban Marijuana cultivation, recognizing Marijuana plants from a surveillance standpoint. Affiant has

also reviewed numerous aerial photographs of Marijuana gardens both here locally, and in the State of Hawaii on special assignment. Your affiant has also discussed Marijuana, its use and preparation for use, with his fellow narcotics officers.

Based upon his training and experience your affiant is aware of the fact that individuals cultivating Marijuana commonly pick and prepare Marijuana for use prior to the harvest of the entire plant. In this regard, your affiant is aware of the fact that cultivators of Marijuana will commonly dry the plant material prior to ingestion in areas protected from the elements such as in their residences. Your affiant is further informed of the fact that prior to its ingestion Marijuana must be separated from the usable leaves prior to its ingestion

by means of hand rolled cigarettes and/or pipes.

Based upon his training and experience your affiant knows that cultivators of Marijuana will frequently have books and records dealing with the care and cultivation of Marijuana.

Your affiant received an anonymous phone message on September 2, 1982. The message read, can see grass growing in yard, Stebbins by Clark, S/B on left. Your affiant responded to the area provided by the anonymous message and located a suspect residence at 2085 Clark Avenue, Santa Clara. Although Marijuana plants could not be observed from the street your affiant located an inner fenced area within the backyard of the above address. Your affiant is familiar with the fact cultivators of Marijuana will frequently conceal their garden with greenhouses, other plants,

12.

and elevated fences. From the street your affiant observed the inner yard with bamboo stakes attached to the top of the existing fence. The bamboo elevated the fence approximately three feet. The inner fence is approximately fifteen feet wide and is attached to the northwest corner of the above dwelling.

Based on training and experience your affiant made aerial observation of the dwelling on the same day at approximately 1420 hours. Aerial observation was from an altitude of not less than 1000 feet above ground level. Your affiant observed, without the use of visual aids or optical aids, the following items, located as hereinbefore described: A green colored residence with surrounding fenced property located on the northeast corner of Clark Avenue and Stebbins Avenue. Within the yard was another fenced yard containing a Marijuana garden.

13.

The garden measured approximately 15X25 feet. The Marijuana plants were full and approximately 8-10 feet tall. A photograph was taken by your affiant and is attached as exhibit "A".

Your affiant was accompanied by Agent R. Rodriguez of the Santa Clara County Narcotics Task Force. Agent Rodriguez has been assigned to the Task Force for one and a half years. His experience with Marijuana cultivation is as follows: July 1981-Attended the Department of Justice 80-hour Narcotics Investigation Course, a segment of which was dedicated to Marijuana cultivation and aerial observation of Marijuana. September 1981-Conducted aerial surveillance of eight Marijuana gardens, including one greenhouse, which were seized and found to be, in fact, cultivated Marijuana.

14.

July 1982-Attended the Department of Justice 80-hour Marijuana Eradication Course which included aerial observation of 13 gardens of Marijuana which were seized and found to be, in fact, Marijuana. Agent Rodriguez has also seized seven Marijuana gardens located at private homes in residential areas.

Based upon your affiant's experience, training, expertise and observations hereinbefore described, your Affiant formed the opinion that the garden located and described contains Marijuana under cultivation because of its appearance. Agent Rodriguez's opinion, based on his observation and expertise concurs with the opinion formed by your affiant regarding the cultivation of Marijuana at the garden located and described hereinbefore. Affiant knows about Rodriguez's opinion and experience because he told Affiant about it.

15.

Affiant believes that the first above mentioned evidence of the commission of a felony will be located at the premises first above described.

That based upon the above facts, your affiant prays that a Search Warrant be issued with respect to the above location for the seizure of said property and that same be held under Section 1536 of the Penal Code and disposed of according to law.

Subscribed and sworn	[Manuscript
to before me this	signature
day of	deleted in
September, 1982.	<u>printing.]</u>

[Manuscript signature deleted in
JUDGE OF THE MUNICIPAL COURT printing.]

GWK:tr

[Exhibit "A" (photograph) deleted in printing.]

[Clerk's Transcript p. 2]

IN THE MUNICIPAL COURT OF THE STATE
OF CALIFORNIA
SANTA CLARA COUNTY JUDICIAL DISTRICT
SANTA CLARA FACILITY

FILED
MAY 9-1983
JOHN KAZUBOWSKI, Clerk
[Manuscript
signature deleted
in printing.]

BEFORE THE HONORABLE
WILLIAM F. BROWN, JR., JUDGE

---o0o---

THE PEOPLE OF THE STATE	NO.: D8231923
OF CALIFORNIA,	CHARGE: Violation
Plaintiff,	of Section
	Ct. 1 - 11358 H&S

vs.

DANTE CARLO CIRAOLLO,
Defendant.

---o0o---

PRELIMINARY EXAMINATION 88043
Wednesday, April 27, 1983
2:00 o'clock p.m.

---o0o---

APPEARANCES

For the People: JULIUS L. FINKELSTEIN
Deputy District Attorney

For the Defendants: JOHN C. HORNING, JR.
Deputy Public Defender

Marolyn O. Chow, CSR
Official Court Reporter
Certificate No. 2587

---o0o---

[CT 4]

Santa Clara, California April 27, 1983

PROCEEDINGS

THE COURT: Call the case then of
People versus Dante Ciraolo.

MR. FINKELSTEIN: Yes, Your Honor.
Julius Finkelstein, Deputy District
Attorney, appearing on behalf of the
People We're ready.

MR. HORNING: I'm John Horning for
the Defense, Your Honor.

THE COURT: All right. This is the
time set for the preliminary examination
on alleged felony violation of Health
and Safety Code 11358, cultivation of
marijuana, alleged on September 9th,
1982.

And your investigating officer,
please.

MR. FINKELSTEIN: Yes. May it
please the Court, we'd like to designate
Officer Shutz of the Santa Clara Police

Department as the People's investigating officer for the purposes of this hearing.

And we'd ask that all witnesses be excluded and separated during this hearing, save and except for the investigating officer.

THE COURT: All right. Then all witnesses that are to testify in this case, if you would kindly step outside this court, and I would admonish you not to discuss the matter while the case is pending. And the deputy will call you in when you are to testify.

Your first witness then, please.

MR. FINKELSTEIN: We would call Officer Shutz.

[CT 5]

JOHN CHARLES SHUTZ,
called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

A. (BY MR. FINKELSTEIN) Would you please state your full name and spell your last name for the record?

A. JOHN CHARLES SHUTZ. S-h-u-t-z.

Q. You're a police officer for the City of Santa Clara?

A. Yes. I am.

Q. You're currently assigned to patrol?

A. Yes.

Q. You were previously assigned to the narcotics squad?

A. Yes. I was.

Q. How long did you serve on the narcotics squad?

A. Two years.

Q. And when did you go on to patrol duty?

A. Sometime in October, 1982.

MR. FINKELSTEIN: Your Honor, I have a certified copy of a search warrant and

affidavit in support of search warrant for premises located at 2085 Clark Avenue in the City of Santa Clara.

Like to have that marked as Exhibit One for identification.

THE COURT: May be so marked.

(Whereupon, the above-mentioned search warrant and affidavit, *People's One, an exhibit marked for identification.)

Q. (BY MR. FINKELSTEIN) On the 8th of September, Nineteen [CT 6] Hundred and Eighty-Two, did you conduct a search of premises located at 2085 Clark Avenue in the City and County of Santa Clara?

A. That was on September 9th that that search warrant was served.

Q. Strike that. You conducted a search on September 9th of 1982?

A. Yes, sir.

Q. And did you have a search warrant with you at the time?

A. Yes. I did.

Q. Is Exhibit One a certified copy of the warrant which you had with you at the time you searched the premises?

A. It is.

Q. And did you examine the back yard?

A. Briefly, yes.

Q. Was -- Did you discover any marijuana growing in the back yard?

A. Yes.

Q. I take it you had training on recognizing marijuana in the past?

A. Yes.

Q. And in the investigation of marijuana cultivation cases?

A. Yes.

Q. In your opinion, was the marijuana nurtured by human hand?

A. Yes.

Q. Did you find any evidence to establish who was occupying those premises at the time of the search?

A. Yes. We found several items. [CT 7]

Q. What did you find?

A. A citation from an incident that took place in the City of Santa Clara --

Q. You mean a misdemeanor citation?

A. Yes. I believe it was for a Business and Professions Code, an alcohol violation.

Q. Do you have that with you in court today?

A. It's in court file.

Q. May I see it, please.

MR. FINKELSTEIN: Your Honor, the witness has just handed me a copy of a Notice To Appear made out in the name of Dante Carlo Ciruolo, C-i-r-a-o-l-i. May we have it marked as Exhibit Two for identification?

THE COURT: May be so marked.

(Whereupon, the above-mentioned Notice to Appear, *People's Two, an exhibit marked for identification.)

Q. (BY MR. FINKELSTEIN) Is Exhibit Two the citation that was found on the premises that day?

A. Yes.

Q. And did you ever encounter a Mr. Ciruolo at the premises that day?

A. Yes. I did.

Q. Where did you see him?

A. I first saw him when I approached the front door of the residence, and he was walking down the hallway directly towards me.

Q. He was inside the residence?

A. Yes. [CT 8]

Q. Did you -- Are you the officer that knocked on the front door?

A. Yes.

Q. Did you give any warning or notice at the time you knocked on the front door?

A. Yes.

Q. Were you in full police uniform at the time?

A. Well, at the time, I was a narcotics officer, and typically, we would wear dark blue windbreakers with the Santa Clara Police logo on the back and a star on the front. And, occasionally, we would attach our badges to the front of the raid jacket.

Q. What did you say, if anything, when you knocked on the front door in this case?

A. I advised that we were police officers and that I had a search warrant for the residence; please open the door.

Q. Somebody open the door from inside?

A. Yes.

Q. Who was that?

A. That was Mr. Ciruolo's brother, Steve.

Q. And then did you -- when the door was opened, did you see Mr. Ciruolo?

A. Yes.

Q. And where was he?

A. He was coming down the hallway.

Q. And did you see that Mr. Ciruolo present in this courtroom this afternoon?

A. Yes, sir. [CT 9]

Q. Would you point him out, please?

A. He's seated next to Defense Counsel.

MR. FINKELSTEIN: Your Honor, may the record reflect the in-court identification of the defendant.

THE COURT: Let the record so show that.

Q. (BY MR. FINKELSTEIN) What time was it when you executed this search warrant?

A. Referring to my report, it was around 1150 hours in the morning.

Q. Shortly before noon.

A. Yes.

MR. FINKELSTEIN: I have no further questions.

CROSS EXAMINATION

Q. (BY MR. HORNING) Officer, when you first went to the residence at 2085, where did you go?

A. First time?

Q. Well, on the -- on the 9th, on September 9th, did you go up to the front door or to the back yard or --

A. I went to the front door.

Q. And where were the other officers at that time?

A. They spread out going to the side yards.

Q. They go through any gates, to your knowledge?

A. Not to my knowledge.

Q. Okay. I take it, then, you were all in front of the house?

A. No.

Q. How many officers were with you?

A. I recall myself, Detective Kerby, Sergeant Keech, Detective Hayes, and I believe Detective McCarthy. And two [CT 10] others from the narcotics task force for the county.

Q. And did you go to the front door preparatory to going around in back and looking in the back yard?

A. Yes.

Q. And you knocked, you said?

A. Yes. I believe I did.

Q. What happened then?

A. I advised through a loud voice my presence as a police officer; that I had a search warrant. And almost immediately thereafter, I got a response at the front door from -- Dante's brother, Steven.

Q. Was the front door open or closed at this time?

A. I'm trying to recall that. To the best of my recollection, I believe the

front door was open; the screen door was closed.

Q. When Steven came to the door, what did he do or say?

A. I remember that specifically. He said, "I knew it."

Q. And what was your response to that?

A. Things were fairly mellow at that point. We had no problems whatsoever with the people inside. We -- He asked us to come in. We walked in. I showed him the search warrant. Then we went about our business.

Q. Okay. Where did your business take you?

A. Well, first of all, I went to the front dining room and began to assign different tasks for the other officers that were there. In other words, I had Detective McCarthy complete interviews of anybody that was inside; Sergeant Keech fill out the paperwork of any evidence

seized. And the rest of the [CT 11] officers were assigned to searching the residence.

MR. HORNING: Your Honor, I would like to ask some questions of the officer which would relate to traversing the warrant. I haven't made a motion to do that yet, and I might not. Depend upon what his testimony is.

MR. FINKELSTEIN: I have no objection.

THE COURT: All right. You may proceed, Counsel.

Q. (BY MR. HORNING) You're the officer that obtained the warrant in this case. Is that not true?

A. Yes.

Q. And you had some information about activity at this address I take it. Is that right?

A. Yes.

A. And as a result of that, you conducted an investigation in an airplane. Is that right?

A. Yes.

Q. And can you tell us how you went about that?

A. I received an anonymous complaint from a citizen who wished not to give a name, stating there were marijuana plants growing in the back yard of a particular house. I believe it said on Clark near Stebbins, on the south side of the street. I don't remember the exact words.

As a result of that and many other complaints I got for other homes within the City of Santa Clara, I accumulated all these complaints into a file. And as a result of getting all these complaints in a file, I chartered an airplane, and with a qualified pilot, we went out with several people in the aircraft and made

observations and took photographs of these particular [CT 12] residences.

Q. Was the plane chartered at the San Jose airport?

A. Yes.

Q. Do you recall the name of the pilot?

A. I only recall his first name is Tim.

Q. And what firm did you charter the aircraft from?

A. I don't recall that. I could find out.

Q. And is there a certain altitude at which you flew over the areas that you were inspecting?

A. Thousand feet minimum.

Q. Okay. Now, was there some reason why you selected a thousand feet?

A. Well, I was told that by an individual that had just went through two weeks of the DOJ Marijuana Eradication School. Their recommendation was one thousand feet.

Q. This was for over-flights?

A. Yes.

Q. Did you relay that information to the pilot?

A. Oh, yes.

Q. Did you use any binoculars to assist you with your inspecting of the areas you were out to look at?

A. No.

Q. Did any of the others officers?

A. No. We didn't take any visual aids whatsoever up into the aircraft.

Q. And did you look to see whether or not the officer observed the thousand foot limit you'd set up on him. I'm sorry, the pilot; whether the pilot observed that.

[CT 13]

A. I reminded him, I recall several times, to make sure he stays at least above a thousand feet.

Q. Were you looking at the altimeter in the aircraft from time to time.

A. Several times I did, yes.

Q. And when you looked at it, were you able to tell whether or not he was above or below a thousand feet?

A. Oh. I knew by looking at the altimeter that he wasn't below a thousand feet.

A. Were you able to read the altimeter?

A. Yes.

Q. Do you have any pilot training yourself?

A. No.

Q. Were there photographs taken from the airplane?

A. Yes.

Q. Do you have a photograph of the premises in question here with you?

A. I believe those photographs are filed in the original court search warrant.

Q. Looks like there is one with the affidavit that --

A. That's a xerox copy.

Q. Okay. Now, what's a Xerox copy?

A. It's a Xerox copy of the photograph in Exhibit A of the affidavit.

Q. You say the original's lodged with the Court?

A. Yes.

Q. Now, my question is: Was there more than one such photograph taken of 2085 Clark Avenue. [CT 14]

A. There may have been. If I can take a look inside this file.

Q. Would you, please.

A. (Witness complies.)

Yes. I have one in front of me.

Q. May I see it, please.

A. (Witness complies).

MR. HORNING: Like that marked as Defense exhibit first in order Your Honor. It's a photograph of houses.

THE COURT: May be marked Defense A then.

(Whereupon, the above-mentioned photograph, *Defendant's A, an exhibit marked for identification.)

Q. (BY MR. HORNING) Officer Shutz, let me show you this photograph you've just handed me marked Defense Exhibit A and ask you what it shows.

A. Shows residential tract that I recognize as particular streets in the City of Santa Clara, and specifically in the center of the photograph, is the house where Dante Ciruolo lives and indicates front yard, side yard, and back yard.

Q. And could you see the marijuana from where you were when you took that photograph?

A. Yes.

Q. Would you point that out to me, please.

A. It's right here in the center of the photo.

Q. And what is there about that growth to enable to you to identify it as being marijuana.

A. The color.

Q. Anything else? [CT 15]

A. No. That's what attracted me the most, was the color.

Q. Well, if -- the color's green like the other plants you see in the picture. Isn't it?

A. Not that same shade of green. The photograph does not really show the highlights of the green that comes off a marijuana leaf. This is not a true representation of that color. There is a difference when you look at this photograph, between itself and the other plants around it, but you have to see it with the naked eye. This particular camera did not have any filtering equipment on it, either.

Q. Did you take the picture, incidentally?

A. Yes.

Q. What kind of a camera was used?

A. It's a thirty-five millimeter single reflex.

Q. Was there anything about the area where you saw this -- these plants or the way they were located or anything else that caused you to believe they were marijuana?

A. One other thing.

Q. What's that?

A. The fence line bordering the marijuana plants had elevated bamboo stakes, increasing a height of the standard six foot fence to probably -- ten feet.

Q. Could you see that from where you were?

A. Yes.

Q. In the airplane?

A. I saw it earlier when I went by the house on foot.

Q. Did you at times after or before you looked at this particular place on Clark from the airplane fly lower over that [CT 16] same neighborhood?

A. Not that I recall.

Q. You just remember going over and taking the picture and looking and --

A. Yes. We were extremely busy with plotting our direction. We had a number of different places to go. We had to watch for other aircraft. We were in a flight line with the San Jose airport. And all I recall is plotting these various locations on my map; attempting to get the one point after another, without tying up air traffic too long.

Q. Were you surprised at what you found in that flight?

A. Pardon?

Q. Were you surprised by what you found as a result of that flight?

A. No. Not at all.

Q. How many --

A. We expected that.

Q. How many different locations did you find marijuana growing in the city?

A. In the city? I would say five.

Q. During that flight?

A. Yes.

Q. Did you have some false reports you discovered, as well?

A. Yes.

Q. How many places did you look at in all?

A. In all? Maybe ten to twelve.

Q. And so, then, five had marijuana and five to seven did not. Would that be correct? [CT 17]

A. Right.

MR. HORNING: I have no further questions, Your Honor.

MR. FINKELSTEIN: Just briefly.

REDIRECT EXAMINATION

Q. (BY MR. FINKELSTEIN) Approximately how many plants were there in this case?

A. Seventy-three.

Q. And what was the approximate and average height of the plants?

A. Eight feet.

MR. FINKELSTEIN: Thank you. I have no further questions.

THE COURT: Anything else.

MR. HORNING: No.

THE COURT: Thank you, Officer. May step down.

THE WITNESS: Thank you, Your Honor.

MR. FINKELSTEIN: We would offer Exhibits One and Two in evidence. And we have no additional witnesses to call at this hearing.

THE COURT: All right. Any objection to the entry of those?

MR. HORNING: Not on the state of the evidence, Your Honor.

THE COURT: All right. That will be entered at this point.

(Whereupon, admitted to evidence, *People's One and Two, exhibits previously marked for identification.) [CT 18]

THE COURT: Counsel, do you wish to submit Defense A, as well.

MR. HORNING: No, Your Honor.

THE COURT: All right. Any witnesses that you would want to call?

MR. HORNING: Not at this hearing.

THE COURT: All right. And is the matter submitted then.

MR. HORNING: Yes.

THE COURT: All right. It appearing to the Court that a crime has been committed and that there's a strong suspicion that the defendant committed the

same, I'll hold him to answer in the Superior Court of this County.

And the arraignment in that matter, then, would be on May the 9th. And will be at 1:30 p.m. in the afternoon in the Superior Court.

MR. FINKELSTEIN: Your Honor, may all exhibits, including Defense A, be released to Officer Shutz?

THE COURT: All right. That would be so ordered.

MR. FINKELSTEIN: Thank you.

THE COURT: You're welcome.

(Whereupon, at the hour of 4:40 p.m., these proceedings were concluded this day.)

[Court Reporter's Certificate deleted in printing.]

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE	)	The 8th day
OF CALIFORNIA,	)	of August,
	)	A.D., 1983
Plaintiff,)	
	)	*AMENDED
Against	)	FILED
	)	AUG 8, 1983
DANTE CARLO CIRAOLLO,	)	JOHN KAZUBOWSKI
	)	Clerk
Defendant.	)	[coding
	)	deleted in
	)	printing.]
	)	INFORMATION
		NO.88043

COUNT ONE

The District Attorney of the County of Santa Clara, State of California, hereby accuses DANTE CARLO CIRAOLLO of a felony, to-wit: a viol. of Calif. Health and Safety Code Section 11358 (CULTIVATION-MARIJUANA) in that, on or about the 9th day of September, A.D., 1982, in the County of Santa Clara, State of California, the said defendant(s) did plant, cultivate,

harvest, dry and process a controlled substance, to wit: MARIJUANA.

COUNT TWO

* * * * *

Leo Himmelsbach

District Attorney

[coding deleted in printing.] By [Manuscript signature deleted in printing.]
JOYCE F. NEDDE/D89

Deputy District Attorney

[Reporter's Transcript, p. 2]

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
DEPARTMENT NO. 2

BEFORE HONORABLE
WILLIAM J. HARRIS, JR., JUDGE
---o0o---

THE PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
)	
Plaintiff,	)	NO. 88043
)	
vs.)	
)	
DANTE CARLO CIRAULO,)	
)	
Defendant.)	

---o0o---

SAN JOSE, CALIFORNIA
AUGUST 15, 1983

---o0o---

APPEARANCES:

FOR THE PEOPLE: NEAL J. KIMBALL,
DEPUTY DISTRICT
ATTORNEY

FOR THE DEFENDANT: ROBERT WEEKS &
ROBERT REGAN,
DEPUTY PUBLIC
DEFENDERS
CRAIG KRONER,
CERTIFIED LAW
STUDENT

---o0o---

[RT 3]

P R O C E E D I N G S

THE COURT: THIS IS ACTION NUMBER 88043, THE PEOPLE OF THE STATE OF CALIFORNIA VERSUS DANTE C. CIRAOLLO.

MR. KIMBALL: NEAL J. KIMBALL, DEPUTY DISTRICT ATTORNEY, FOR THE PEOPLE, YOUR HONOR.

MR. REGAN: MR. CIRAOLLO IS PRESENT, REPRESENTED BY THE PUBLIC DEFENDER'S OFFICE, YOUR HONOR, ROBERT REGAN APPEARING WITH LAW STUDENT CRAIG KRONER AND MR. WEEKS.

THE COURT: SPELL YOUR LAST NAME FOR THE RECORD, MR. KRONER.

MR. KRONER: K-R-O-N-E-R.

MR. REGAN: THIS MOTION WILL BE ARGUED BY MR. KRONER, AND THE CONSENT OF THE DEFENDANT TO HAVE HIM REPRESENT HIM IN THIS MOTION HAS BEEN SIGNED BY MR. CIRAOLLO.

THE COURT: IT MAY BE FILED HEREIN.

MR. REGAN: THERE IS ONE MATTER. LAST WEEK THE MATTER WAS CONTINUED BY STIPULATION DUE TO MY VACATION AND MR. CIRAOLLO APPARENTLY MISUNDERSTOOD WHERE TO GO. HE WAS IN THE BUILDING, I UNDERSTAND, BUT DID NOT APPEAR AND WAS TOLD THAT A BENCH WARRANT HAD BEEN ISSUED. IF THAT IS THE CASE, I WOULD ASK THE COURT TO RECALL IT AT THIS TIME.

THE COURT: MR. CLERK? IT DOESN'T APPEAR THAT THAT IS THE CASE, BUT I JUST WANT TO CHECK.

THE CLERK: THAT IS CORRECT, YOUR HONOR.

MR. REGAN: OKAY. FINE.

THE COURT: LET THE RECORD SHOW THE COURT HAS [RT 4] RECEIVED, READ AND CONSIDERED THE POINTS & AUTHORITIES BOTH BY THE MOVING PARTY AND THE RESPONDING PARTY IN THIS MATTER. THE MOVING PARTY CARE TO BE HEARD FURTHER?

MR. KRONER: YES, YOUR HONOR. WE HAVE SOME TESTIMONY TO PRESENT IN THIS CASE.

THE COURT: CALL YOUR FIRST WITNESS.

MR. KRONER: WE WOULD LIKE TO CALL MARY CIRAULO.

THE COURT: IS THERE A STIPULATION THAT THERE WAS NO SEARCH WARRANT IN THIS CASE?

MR. KIMBALL: YOUR HONOR, THIS IS A SEARCH WARRANT CASE. I WILL OFFER TO STIPULATE WITH THE DEFENSE COUNSEL THAT THE EXHIBIT ATTACHED TO THE BACK OF HIS MOVING PAPERS, WHICH INCLUDE A SEARCH WARRANT FOR 2085 CLARK AVENUE IN THE CITY OF SANTA CLARA AND THE AFFIDAVIT IN SUPPORT THEREOF MAY BE ADMITTED INTO EVIDENCE AT THIS TIME.

THE COURT: AND THAT IS INCLUDING THE EXHIBIT THAT IS THE PICTURE, RIGHT?

MR. KIMBALL: YES, YOUR HONOR.

MR. KRONER: WE WILL STIPULATE TO THAT, YOUR HONOR.

THE COURT: THE SEARCH WARRANT, WHO IS IT SIGNED BY?

MR. KIMBALL: JOSEPH BIAFORE, I BELIEVE. YES.

THE COURT: FILED ON SEPTEMBER 21, '82. AND THE AFFIDAVIT IN SUPPORT OF SEARCH WARRANT FILED SEPTEMBER 8, '82 THE AFFIDAVIT BEING SIGNED BY DETECTIVE JOHN SHULTZ. BENCH WARRANT BEING SIGNED BY JOSEPH BIAFORE, I BELIEVE, YES, JUDGE [RT 5] OF THE MUNICIPAL COURT, WILL BE ADMITTED INTO EVIDENCE BY STIPULATION.

(WHEREUPON, THE ABOVE-MENTIONED DOCUMENT, BEING A BENCH WARRANT, WAS RECEIVED IN EVIDENCE AND MARKED PEOPLE'S EXHIBIT NO. 1.)

MR. KRONER: YOUR HONOR, WE WOULD ALSO LIKE TO STIPULATE TO THE PRELIMINARY EXAMINATION TRANSCRIPT.

THE COURT: VERY WELL. ANY OBJECTION?

MR. KIMBALL: NO, YOUR HONOR. I DON'T QUITE UNDERSTAND THAT. AS FAR AS THE MOVING PAPERS INDICATE, THEY ARE CLAIMING THAT AN AERIAL OVERFLIGHT OF 1,000 FEET WAS SOME TYPE OF INFRINGEMENT. THEN THE OFFICER GOT A SEARCH WARRANT AND THE SEARCH APPEARS TO ME TO BE BASED ON THE SEARCH WARRANT. YOU DON'T NEED THE PRELIMINARY EXAMINATION TRANSCRIPT.

THE COURT: WELL, IT MIGHT SHOW HOW THE SEARCH WARRANT WAS ISSUED.

MR. KRONER: EXACTLY.

THE COURT: THE TRANSCRIPT OF THE PRELIMINARY EXAMINATION WILL BE RECEIVED IN EVIDENCE. AFFIDAVIT AND THE SEARCH WARRANT WILL BE ONE AND THE PRELIMINARY EXAMINATION WILL BE TWO.

(WHEREUPON, THE PRELIMINARY EXAMINATION TRANSCRIPT WAS RECEIVED IN EVIDENCE AND MARKED PEOPLE'S EXHIBIT NO. 2.)

THE COURT: YOU MAY CALL YOUR FIRST WITNESS.

MR. KRONER: I WOULD LIKE TO CALL MARY CIRAOLO TO [RT 6] THE STAND.

MR. KIMBALL: FOR THE RECORD, PEOPLE OBJECT TO THIS TESTIMONY ON THE GROUND THAT THIS EVIDENCE WAS NOT BEFORE JUDGE BIAFORE WHEN HE ISSUED THE SEARCH WARRANT. IT SEEMS TO ME THAT THE SEARCH WARRANT OF THE RESIDENCE AND THE BACK YARD FLIES ON THE SEARCH WARRANT AFFIDAVIT.

THE COURT: I WOULD AGREE. DO YOU WANT TO BE HEARD?

MR. KRONER: YES, YOUR HONOR. HER TESTIMONY IS IMPORTANT TO THIS MOTION BECAUSE SHE CAN ESTABLISH CERTAIN FACTORS THAT SHOW THAT THE OBSERVATION OF THE DEFENDANT'S BACK YARD VIOLATED HIS RIGHT TO PRIVACY AND HIS RIGHT TO THE FOURTH AMENDMENT.

THE COURT: WE HAVE A SEARCH WARRANT HERE, COUNSEL.

MR. KRONER: THAT IS CORRECT.

THE COURT: ARE YOU TRAVERSING THE SEARCH WARRANT?

MR. KRONER: WE ARE ARGUING THAT THE OFFICER -- THE AERIAL OVERFLIGHT EVIDENCE OBTAINED FROM THAT WAS USED TO PROCURE THE SEARCH WARRANT.

THE COURT: I UNDERSTAND THAT.

MR. KRONER: OKAY.

THE COURT: I DON'T SEE WHAT THE WITNESS'S TESTIMONY IS GOING TO ADD TO THIS. I AM GOING TO LOOK AT THE SEARCH WARRANT TO SEE IF THE SEARCH WARRANT IS GOOD.

MR. WEEKS: MAY I HAVE A MOMENT, YOUR HONOR?

(WHEREUPON, COUNSEL FOR THE DEFENDANT CONFERRED [RT 7] OFF THE RECORD.)

MR. KRONER: YOUR HONOR, THERE WAS A PHOTOGRAPH ATTACHED TO THE SEARCH WARRANT

OF THE DEFENDANT'S BACK YARD AND MISS CIRAOLO'S TESTIMONY WILL HELP CLARIFY OUR POSITION THAT THE AERIAL SURVEILLANCE OF THE BACK YARD VIOLATED HIS RIGHT TO PRIVACY.

THE COURT: I WILL SUSTAIN THE PEOPLE'S OBJECTION TO THE INTRODUCTION OF THAT PROFFERED EVIDENCE.

MR. KRONER: OKAY, YOUR HONOR. THEN I WOULD JUST LIKE TO RESPOND TO THE PEOPLE'S POINT & AUTHORITIES.

THE COURT: OKAY.

MR. KRONER: BY SAYING THAT THEY BASE THEIR POINTS & AUTHORITIES ON SAYING THAT THE DEFENDANT'S RIGHT TO PRIVACY HERE WAS PURELY SUBJECTIVE AND THEY MENTION THAT THE DETERMINATION IS MADE ON THE TOTALITY OF THE CIRCUMSTANCES OF WHETHER THEY OBJECTIVELY EXHIBITED THE EXPECTATION OF PRIVACY.

THE COURT: COUNSEL, I CONSIDER THIS MATTER A QUESTION OF LAW BASED UPON THE

INFORMATION CONTAINED IN THE SEARCH WARRANT. I THINK AT THIS STAGE OF THE PROCEEDING I MUST CONSIDER THE INFORMATION CONTAINED IN THE SEARCH WARRANT TO BE TRUE.

MR. KRONER: I AM NOT ARGUING THAT THE INFORMATION CONTAINED IN THE SEARCH WARRANT ISN'T TRUE, YOUR HONOR. MY ARGUMENT IS THAT THE AERIAL SURVEILLANCE THAT LED TO THE PROCUREMENT OF THE SEARCH WARRANT VIOLATED THE DEFENDANT'S [RT 8] FOURTH AMENDMENT RIGHT AND HIS RIGHT TO PRIVACY.

THE COURT: ALL RIGHT. GO AHEAD.

MR. KRONER: AND IN MY POINTS & AUTHORITIES I POINT OUT THAT HIS BACK YARD HAD A HIGH FENCE AROUND IT. THE PURPOSE OF THE FENCE WAS FOR -- TO PROTECT THE PRIVACY OF THE FAMILY LIVING AT THE HOUSE OF THEIR PRIVACY. THERE WAS A POOL IN THE BACK YARD. THERE WAS SUN BATHING GOING ON. IT CLEARLY DEMONSTRATED A RIGHT TO

PRIVACY IN THE BACK YARD. AND THESE SPECIFIC ACTIVITIES ARE MENTIONED IN DEAN VERSUS SUPERIOR COURT OF AREAS THAT CUSTOMARILY -- ARE CUSTOMARILY PRIVATE AND THEY DO EXHIBIT A REASONABLE EXPECTATION OF PRIVACY.

NOW, I AM ALSO ARGUING THAT PEOPLE VERSUS ARNOLD SHOULD CONTROL THE OUTCOME OF THIS CASE BECAUSE HERE THE POLICE VIEWED AN AREA THAT WAS COVERED BY A REASONABLE EXPECTATION OF PRIVACY BY SOME TYPE OF OPTICAL AID, AND THEY COULD NOT HAVE VIEWED IT WITHOUT THE AID OF EITHER A BINOCULAR OR IN THIS CASE AN AIRPLANE. BECAUSE THE POLICE HAD TO WHAT I MIGHT SAY CIRCUMVENT THE FENCE TO GET A VIEW OF WHAT WAS INSIDE THE DEFENDANT'S BACK YARD, THEY VIOLATED HIS RIGHT TO PRIVACY.

THE COURT: THANK YOU.

MR. KRONER: I WOULD ALSO LIKE TO ADD THAT THE POLICE KNEW THAT THE FENCE

WAS THERE AND THAT IS WHY THEY HAD TO GO OUT AND RENT AN AIRPLANE TO LOOK DOWN UPON THE YARD, BECAUSE THEY JUST OTHERWISE COULD NOT VIEW THE BACK [RT 9] YARD.

THE COURT: I AM JUST WONDERING, COUNSEL, HOW YOU GET TO WHERE YOU ARE. AN AFFIDAVIT WAS DRAWN UP BY AN OFFICER, WAS PRESENTED TO A MAGISTRATE. THE MAGISTRATE, BASED UPON THAT AFFIDAVIT, ISSUED A SEARCH WARRANT.

MR. KRONER: YES, YOUR HONOR. AND I REALIZE THAT THAT IS PRESUMPTION THAT THE SEARCH WARRANT OR THE SEARCH WAS LEGAL. NOW, I KNOW, TOO, YOU ARE AWARE THAT WE ARE NOT ATTACKING THE SEARCH WARRANT ITSELF. WE ARE ATTACKING THE MEANS USED TO PROCURE THE SEARCH WARRANT, WHICH WAS AN UNCONSTITUTIONAL SURVEILLANCE OF THE PLAINTIFF'S BACK YARD -- OR THE DEFENDANT'S BACK YARD.

THE COURT: HOW DO YOU GET THERE?

MR. KRONER: WELL, MR. CIRAOLO'S BACK YARD --

COURT: NO, NOT FACTS, PROCEDURALLY.

MR. KRONER: EXCUSE ME, YOUR HONOR?

THE COURT: DO WE ASSUME THE FACTS CONTAINED IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT ARE TRUE?

MR. KRONER: YES, WE DO.

THE COURT: THEN YOU ARE SAYING AS A MATTER OF LAW THOSE FACTS CONTAINED IN THE SEARCH WARRANT VIOLATED THE DEFENDANT'S FOURTH AMENDMENT RIGHT OR HIS RIGHT OF PRIVACY?

MR. KRONER: CORRECT. WELL, THE RIGHT OF PRIVACY IS COEXISTANT WITH THE FOURTH AMENDMENT RIGHT, SO THAT WHEN THE POLICE SURVEILLED MR. CIRAOLO'S BACK YARD THAT A [RT 10] REASONABLE EXPECTATION BY VIRTUE OF THE FENCE THAT SURROUNDED THE SWIMMING POOL AND THE SUN BATHING AREA, THEY VIOLATED HIS RIGHT TO PRIVACY BY THAT ACT.

THE COURT: CAN YOU GIVE ME AN EXAMPLE OTHER THAN AN AERIAL SURVEILLANCE, SOMETHING THAT WOULD BE ANALAGOUS TO THIS SUBJECT?

MR. KRONER: WELL, YOUR HONOR, THERE WAS A FENCE SURROUNDING THIS BACK YARD AND THE POLICE, THEY COULDN'T VERY WELL --

THE COURT: NO. NO. YOU MISUNDERSTAND ME. I AM NOT TALKING ABOUT THE FACTS OF THIS CASE. I UNDERSTAND THE FACTS OF THIS CASE VERY WELL. I AM CONFINING MYSELF TO THOSE CONTAINED IN THE AFFIDAVIT FOR SEARCH WARRANT, RIGHT?

MR. KRONER: YES.

THE COURT: YOU ARE TRYING TO OVERCOME THE PRESUMPTION OF THE LEGALITY OF THE SEARCH, RIGHT?

MR. KRONER: THAT IS RIGHT, YOUR HONOR.

THE COURT: HOW ARE YOU DOING THAT? YOU ARE SAYING AS A MATTER OF LAW, GIVEN ALL THESE FACTS, THAT IS IN AND OF ITSELF

VIOLATIVE OF THE DEFENDANT'S FOURTH AMENDMENT, RIGHT?

MR. KRONER: NO. WHAT I AM SAYING IS AS A MATTER OF LAW THE DEFENDANT'S BACK YARD HAS A REASONABLE EXPECTATION OF PRIVACY BY VIRTUE OF THE ITEMS I HAVE ALREADY MENTIONED. NOW, THE POLICE BY -- AND I CITE PEOPLE VERSUS ARNOLD FOR THIS CONTENTION -- THAT THE POLICE USED SOME [RT 11] TYPE OF OPTICAL AID TO CIRCUMVENT THAT FENCE.

THE COURT: I THOUGHT HE LOOKED OUT WITH HIS OWN TWO EYES AND SAID, "I DIDN'T USE BINOCULARS." THEY WERE IN A BUILDING, TOO, WEREN'T THEY?

MR. KRONER: YES, SIR. BUT THE POINT IS, WHETHER HE USED BINOCULARS OR WHETHER HE USED AN AIRPLANE, HE COULD NOT SEE WHAT HE DID WITHOUT THE USE OF SOME TYPE OF AID.

THE COURT: HE COULD SEE FROM WHERE HE WAS, COULDN'T HE?

MR. KRONER: HE HAD TO USE THE AIRPLANE TO LOOK DOWN AND SEE WHAT WAS IN THE BACK YARD. BY THAT WAY HE CIRCUMVENTED THE FENCE THAT THE CIRAOLO FAMILY HAD PUT UP TO INCREASE THEIR PRIVACY.

THE COURT: MAY I HEAR FROM THE PEOPLE?

MR. KIMBALL: YES, YOUR HONOR. THERE ARE SOME CASES THAT HOLD AERIAL OVERFLIGHT UNLAWFUL WHEN THEY ARE VERY LOW TO THE GROUND, LIKE THERE WAS A CASE THAT INVOLVED TWENTY, TWENTY-FIVE FEET. IN THIS PARTICULAR CASE, WHERE YOU ARE 1,000 FEET OVER THE RESIDENCE AND THE OFFICER USES NO VISUAL AID TO SEE DOWN INTO THE BACK YARD, PEOPLE WOULD SUBMIT BASICALLY THAT THAT IS A LAWFUL SURVEILLANCE. AND BASED UPON THAT THE MAGISTRATE WAS ABLE TO ISSUE A SEARCH WARRANT BASED ON REASONABLE AND PROBABLE CAUSE TO BELIEVE THAT THERE WAS IN FACT MARIJUANA PLANTS BEING CULTIVATED IN THE BACK YARD.

PEOPLE WOULD SUBMIT IT.

[RT 12] MR. KRONER: ONCE AGAIN, YOUR HONOR, I THINK IT IS CLEAR TO DISTINGUISH THIS CASE FROM THE ONE THAT THE PEOPLE MENTIONS. AND THOSE WHOLE LINE OF CASES DEAL WITH RURAL PATCHES OF MARIJUANA IN OPEN FIELDS. WHAT WE HAVE HERE IS YOUR BACK YARD, FAMILY SWIMMING POOL, SUN BATHING AREA IN THEIR BACK YARD.

THE COURT: YOU ARE NOT SAYING THAT ANY PRIVATE PILOT FLYING 1,000 FEET COULDN'T SEE THIS?

MR. KRONER: AS A MATTER OF FACT, I DON'T BELIEVE ANY PILOT COULD BECAUSE WHY WOULD HE BE LOOKING FOR IT?

THE COURT: THAT SORT OF BEGS THE QUESTION, DOESN'T IT?

MR. KRONER: THIS WAS A POLICE OFFICER WHO TRIED TO FIND SOME WAY TO INVADE THE PRIVACY OF MR. CIRAOLO SO HE COULD LOOK DOWN.

THE COURT: THEN YOU ARE TALKING ABOUT A PRETEXT, IS THAT RIGHT?

MR. KRONER: NO, I AM TALKING ABOUT THE CIRCUMVENTING OF THE FENCE.

THE COURT: SUPPOSE JUST A SUNDAY AIRPLANE PILOT FLEW OVER, HE COULD SEE THE SAME THING AS THE OFFICER. THERE IS NO PRIVACY INVOLVED THERE. PEOPLE LIVE AROUND AIRPORTS, THEY HAVE TO EXPECT OVERFLIGHTS, DON'T THEY?

MR. KRONER: THAT IS TRUE, BUT THIS ISN'T A PRIVATE CITIZEN. THIS IS A POLICE OFFICER LOOKING FOR PATCHES OF MARIJUANA.

[RT 13] THE COURT: ISN'T THAT EXACTLY THE DISTINCTION THAT A LOT OF THE CASES MENTION, WHAT ORDINARY PERSON COULD SEE FROM WHERE THEY LAWFULLY WERE?

MR. KRONER: WELL, THAT IS MY POINT, TOO, YOUR HONOR. THIS POLICEMAN COULD NOT HAVE SEEN -- THIS POLICEMAN INVADED MR. CIRAOLLO'S RIGHT TO PRIVACY, SO HE COULDN'T HAVE HAD A RIGHT TO BE WHERE HE WAS. I

MEAN, I THINK IT IS CLEAR FROM DEAN VERSUS SUPERIOR COURT THAT A BACK YARD IN AN URBAN AREA THAT HAS THESE TYPES OF ITEMS THAT MR. CIRAOLLO HAS IN HIS BACK YARD DOES EXHIBIT REASONABLE EXPECTATION OF PRIVACY. PEOPLE VERSUS ARNOLD HOLDS THAT WHEN THE POLICE USE SOME TYPE OF OPTICAL AID TO VIEW INTO THAT PROTECTED AREA, THEY VIOLATE THEIR RIGHT TO PRIVACY.

THE COURT: THANK YOU, COUNSEL.

ANYTHING FURTHER ON BEHALF OF THE PEOPLE?

Mr. KIMBALL: NO, YOUR HONOR. THANK YOU.

THE COURT: THE MATTER WILL STAND SUBMITTED. WHEN IS THE PRETRIAL?

MR. REGAN: IT WAS TODAY, YOUR HONOR.

THE COURT: IT WAS TODAY? YOU ARE WAITING ON --

MR. REGAN: WELL, THE CASE IS COMPLICATED BY THE FACT THAT MR. CIRAOLO HAS A NEW CASE THAT JUST ARRIVED FROM MUNI COURT, AND I THOUGHT IT WAS ON THIS COURT'S CALENDAR AS WELL FOR TRIAL SETTING BUT I DON'T SEE IT ON THE CALENDAR. SO I AM NOT CERTAIN WHAT IS GOING TO HAPPEN TO THE TRIAL DATE. IT WILL PROBABLY BE CONTINUED, BUT IT WILL HAVE TO [RT 14] BE OFF THE TRIAL CALENDAR, I SUPPOSE.

THE COURT: ALL I AM DOING IS ORDERING THIS MATTER SUBMITTED. YOU CAN TAKE IT FROM THERE.

THANK YOU

(WHEREUPON, PROCEEDINGS ADJOURNED.)

[Judge's, Clerk's and Court Reporter's Certificates omitted in printing.]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

FILED
AUG 30, 1983
JOHN KAZUBOWSKI, Clerk
By _____ Deputy

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
Plaintiff,	)	NO. 88043
)	
vs)	
)	
DANTE C. CIRAOLO,	)	<u>ORDER OF COURT</u>
Defendant.)	
_____)	

The defendant's Motion to Suppress Evidence pursuant to Penal Code 1538.5 will be and the same is hereby ordered denied.

Dated: August 30, 1983

[Manuscript signature
deleted in printing.]

William J. Harris, Jr.
Judge of the Superior Court

cc: Neal Kimball, DDA
R.K. Regan, PD

DANTE CARLO CIRAOLLO
2085 Clark Avenue
Santa Clara, CA 95051

FILED
JAN 6, 1984
County Clerk
Santa Clara County

In Propria Persona by _____
Deputy

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
)	
Plaintiff,	)	No. 88043
)	
-vs-	)	NOTICE OF
	)	APPEAL
DANTE CARLO CIRAOLLO,	)	PURSUANT TO
	)	PENAL CODE
Defendant.	)	SECTION 1538.5
)	
_____)	

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that the defendant hereby appeals from the judgment entered in the above-entitled case based upon the grounds that the Court improperly denied his motion to suppress certain evidence made pursuant to Penal Code section 1538.5 and/or 1539.

I certify under penalty of perjury that I am indigent and unable to afford counsel and request the Court to appoint counsel to handle my appeal and that all transcripts and clerk's transcripts be prepared at no cost to myself.

Executed at San Jose, California,
this 6th day of January, 1984.

[Manuscript signature
deleted in printing.]

DANTE CARLO CIRAOLLO
In Propria Persona

NOTE REGARDING THE JUDGMENT
OF THE CALIFORNIA COURT OF
APPEAL AND SUBSEQUENT ORDERS

The following relevant opinions,
judgments and orders have been omitted
from this appendix because they appear in
appendices to the Petition for Writ of
Certiorari as noted below:

Opinion and Judgment of the
California Court of Appeal
(1st App. Dist., Div. 5),
dated November 20, 1984

Appendix A

Order Denying Rehearing
dated December 10, 1984

Appendix B

Order Denying Hearing in
California Supreme Court,
dated January 23, 1985

Appendix C

Attorney:

No. 84-1513
October Term, 1984

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THE PEOPLE OF THE STATE
OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

I, the undersigned, say: I am a citizen of the United States, am over the age of 18 years, employed in the City and County of San Francisco, and not a party to the subject cause, my business address being 6000 State Building, San Francisco, California 94102.

I have served the within JOINT APPENDIX as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; and by placing same in separate envelope addressed for and to each addressee named as follows:

Marshal W. Krause
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Grant & Ballentine
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San Jose, CA 95110

Clerk of the Court
California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail at San Francisco, California on the 28th day of June, 1985.

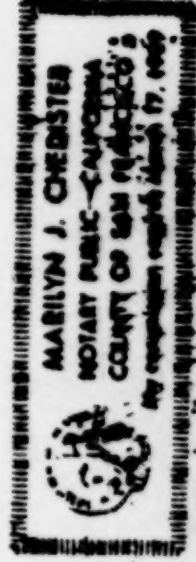
There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Francisco, California, June 28, 1985.

Subscribed and sworn to before me
this 28th day of June 1985.

Marilyn J. Chedister
NOTARY PUBLIC IN AND FOR THE CITY AND
COUNTY OF SAN FRANCISCO, CALIFORNIA.



Elizabeth Aguilera
ELIZABETH AGUILERA

COPY

No. 84-1513

Supreme Court, U.S.
FILED
AUG 10 1985

JOSEPH F. SPANGL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAULO,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

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BEST AVAILABLE COPY

6/1/85

QUESTION PRESENTED

Whether police observation from aircraft of a fenced residential yard is a search under the Fourth Amendment of the United States Constitution.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	3
A. Procedural History	3
B. Facts	6
C. Judgment of the California Court of Appeal	10
Summary of Argument	12
Argument	
I. THE AERIAL OBSERVATION DID NOT INTRUDE INTO LEGITIMATE PRIVACY EXPECTATIONS AND, THEREFORE, DISCOVERY OF CIRAULO'S MARIJUANA GARDEN DID NOT VIOLATE THE FOURTH AMENDMENT . .	16
A. Ciraolo's Expectation That Police Would Not See His Marijuana Garden Is Unreasonable . . .	16

TABLE OF CONTENTS (Cont.)

	Page
B. Police Were In a Public Place Open To Their Use	25
C. Both The Protected Area And Directed Search Rationales Of The Court Of Appeal Should Be Rejected	36
D. Police Did Not Violate A Legitimate Privacy Expectation	44
CONCLUSION	47

TABLE OF AUTHORITIES

	Page
Air Pollution Variance Bd. v. Western Alfalfa Corp. 416 U.S. 861 (1974)	27
Boyd v. United States 116 U.S. 616 (1886)	17
Commonwealth v. Hernley 263 A.2d 904 (Pa.Super. 1970), <u>cert. denied</u> , 401 U.S. 914	35
Commonwealth v. Williams 396 A.2d 1286 (Pa.Super. 1978), <u>rev d on related ground</u> , 431 A.2d 964 (Pa. 1981)	24
Coolidge v. New Hampshire 403 U.S. 443 (1971)	16
Cooper v. Superior Court 118 Cal.App.3d 499, 173 Cal.Rptr. 520 (1981)	34
Dillon v. Superior Court 7 Cal.3d 305, 102 Cal.Rptr. 161, 497 P.2d 505 (1972)	24
Dow Chemical Co. v. United States 749 F.2d 307 (6th Cir. 1984), <u>cert. granted</u> , ___ U.S. ___, ___ L.Ed.2d ___, 105 S.Ct. 2700 . . .	19
Ellison v. United States 206 F.2d 476 (D.C. Cir. 1953) . . .	20

TABLE OF AUTHORITIES (Con't)

	Page
Fullbright v. United States 392 F.2d 432 (10 Cir. 1968), <u>cert. denied</u> , 393 U.S. 830	34
Hester v. United States 265 U.S. 57 (1924)	16
Katz v. United States 389 U.S. 347 (1967)	10
Marshall v. Barlow's Inc. 436 U.S. 307 (1978)	46
Oliver v. United States 466 U.S. ___, 80 L.Ed.2d 214 104 S.Ct. 1735 (1984)	10
Payton v. New York 445 U.S. 573 (1980)	17
People v. Arno 90 Cal.App.3d 505 153 Cal.Rptr. 624 (1979)	35
People v. Bradley 1 Cal.3d 80, 81 Cal.Rptr. 457 460 P.2d 129 (1969)	20
People v. Ciochon 319 N.E.2d 332 (Ill.App. 1974) . . .	35
People v. Ciraolo 161 Cal.App.3d 1081 208 Cal.Rptr. 93 (1984)	1
People v. Hicks 364 N.E.2d 440 (Ill.App. 1977) . . .	34

TABLE OF AUTHORITIES (Con't)

	Page
People v. Lovelace 116 Cal.App.3d 541 172 Cal.Rptr. 65 (1981)	20
People v. Smith 487 N.Y.S.2d 210 (A.D. 4 Dept. 1985)	20
People v. Sneed 32 Cal.App.3d 535 108 Cal.Rptr. 146 (1973)	38
People v. Superior Court (Stroud) 37 Cal.App.3d 836 112 Cal.Rptr. 764 (1974)	39
People v. Vermouth 42 Cal.App.3d 353 116 Cal.Rptr. 675 (1974)	34
Rakas v. Illinois 439 U.S. 128 (1978)	23
Randall v. State 458 So.2d 822 (Fla.App. 2 Dist. 1984)	38
Sims v. State 425 So.2d 563 (Fla.App. 1982) <u>pet. for reversal denied,</u> 436 So.2d 100 (Fla. 1983)	34
Smith v. Maryland 442 U.S. 735 (1979)	21
State v. Blacker 630 P.2d 413 (Or.App. 1981)	35

TABLE OF AUTHORITIES (Cont.)

	Page
State v. Boynton 574 P.2d 1330 (Haw. 1978)	20
State v. Cockrell 689 P.2d 32 (Wash. 1984)	39
State v. Crea 233 N.W.2d 736 (Minn. 1975)	20
State v. Davis 627 P.2d 492 (Or.App. 1981) <u>pet. denied,</u> 634 P.2d 1346 (Or. 1981)	39
State v. Dickerson 313 N.W.2d 526 (Iowa 1981)	45
State v. Holbron 648 P.2d 194 (Haw. 1982)	24
State v. Layne 623 S.W.2d 629 (Tenn.Cr.App. 1981)	44
State v. Lyons 307 S.E.2d 285 (Ga.App. 1983)	20
State v. Manly 530 P.2d 306 (Wash., 1975)	35
State v. Nine 315 So.2d 667 (La. 1975)	20
State v. Rogers 673 P.2d 142 (N.M.App. 1983)	38
State v. Stachler 570 P.2d 1321 (Haw. 1977)	38

TABLE OF AUTHORITIES (Cont.)

	Page
State v. Thompson 241 N.W.2d 511 (Neb. 1976)	35
State v. Ward 617 P.2d 568 (Haw. 1980)	35
Taylor v. United States 265 U.S. 57 (1924)	16
Texas v. Brown 460 U.S. 730 (1983)	13
United States v. Allen 675 F.2d 1373 (9th Cir. 1980) <u>cert. denied</u> , 454 U.S. 833	38
United States v. Bassford 601 F.Supp. 1324 (D. Maine 1985) .	23
United States v. Bifield 498 F.Supp. 497 (D. Conn. 1980) <u>aff'd</u> 659 F.2d 1063 (2d Cir. 1981)	34
United States v. Choate 576 F.2d 165 (9th Cir. 1978) <u>cert. denied</u> , 439 U.S. 953; <u>reiterated</u> , 619 F.2d 21 (9th Cir. 1980) <u>cert. denied</u> , 449 U.S. 951 .	32
United States v. Christensen 524 F.Supp. 344 (N.D. Ill. 1981) .	34
United States v. DeBacker 493 F.Supp. 1078 (W.D. Mich. 1980)	44
United States v. Hensel 699 F.2d 18 (1st Cir. 1983) <u>cert. denied</u> , 461 U.S. 958	38

TABLE OF AUTHORITIES (Cont.)

	Page
United States v. Hoffa 436 F.2d 1243 (7th Cir. 1970) <u>cert. denied</u> , 400 U.S. 1000 . . .	32
United States v. Jacobsen 466 U.S. ___, 80 L.Ed.2d 85 104 S.Ct. 1652 (1984)	22
United States v. Johnson 561 F.2d 832 (D.C. Cir. 1977) (en banc) <u>cert. denied</u> , 432 U.S. 907	25
United States v. Karo 468 U.S. ___, 82 L.Ed.2d 530 104 S.Ct. 3296 (1984)	31
United States v. Kim 415 F.Supp. 1252 (D. Haw. 1976) .	35
United States v. Knotts 662 F.2d 515 (8th Cir. 1981) <u>rev'd</u> 460 U.S. 276	30
United States v. Knotts 460 U.S. 276 (1983)	14
United States v. Lace 669 F.2d 46 (2d Cir. 1982) <u>cert. denied</u> , 455 U.S. 854	34
United States v. Lee 274 U.S. 559 (1927)	33
United States v. Lyons 706 F.2d 321 (D.C. Cir. 1983) . . .	18

TABLE OF AUTHORITIES (Cont.)

	Page
United States v. Magana 512 F.2d 1169 (9th Cir. 1975) <u>cert. denied</u> 423 U.S. 826	20
United States v. Marbury 732 F.2d 390 (5th Cir. 1984)	44
United States v. McMillon 350 F.Supp. 593 (D.C. 1972)	24
United States v. Miller 425 U.S. 435 (1976)	32
United States v. Miller 753 F.2d 1475 (9th Cir. 1985)	45
United States v. Minton 488 F.2d 37 (4th Cir. 1973) <u>cert. denied</u> , 416 U.S. 936	24
United States v. Roberts 747 F.2d 537 (9th Cir. 1984)	20
United States v. Santana 427 U.S. 38 (1976)	17
United States v. Taborda 635 F.2d 131 (2d Cir. 1980)	35
United States v. Ventling 678 F.2d 63 (8th Cir. 1982)	20
United States v. White 401 U.S. 745 (1971) (plurality opinion)	45

STATUTES AND TEXTS

	Page
U.S. CONST. AMENDMENT FOUR	2
14 CODE OF FEDERAL REGULATIONS	
§ 91.79(b)	26
TITLE 28, UNITED STATES CODE	
§ 1257(3)	2
§ 1304	25
CALIFORNIA HEALTH & SAFETY CODE	
§ 11358	3
§ 11360(a)	3
CALIFORNIA PENAL CODE	
§ 1538.5(m)	5
CALIFORNIA PUBLIC UTILITIES CODE	
§ 21401	25
§ 21403	26
Comment, <u>Aerial Surveillance:</u> <u>A Plane View the Fourth Amendment,</u> <u>18 Gonz.L.Rev. 307, n. 100</u> <u>(1982-83)</u>	39
Annot., <u>Employment of Photographic</u> <u>Equipment to Record Presence</u> <u>and Nature of Items as Constituting</u> <u>Unreasonable Search, 27 A.L.R.</u> <u>4th 532 (1984)</u>	45

TABLE OF AUTHORITIES (Cont.)

Page

1 LaFave, Search and Seizure, A
Treatise on the Fourth Amendment
(1978)

§ 2.2(a)	41
§ 2.3	26

No. 84-1513

 IN THE SUPREME COURT

OF THE

UNITED STATES

 OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

 ON WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

 OPINION BELOW

The opinion of the Court of Appeal
(Pet. App. A1-A21) is reported at 161
Cal.App.3d 1081, 208 Cal.Rptr. 93.

JURISDICTION

The judgment of the Court of Appeal was filed on November 20, 1984. (Pet. App. A1.) On December 20, 1984, a petition for rehearing was denied. (Pet. App. B.) The California Supreme Court denied a hearing on January 23, 1985. (Pet. App. C.)

A petition for a writ of certiorari was filed on March 22, 1985. On June 3, 1985, a writ of certiorari was granted limited to the first question in the petition. ___ U.S. ___ L.Ed.2d __, 105 S.Ct. 2672.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent

part:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

STATEMENT OF THE CASE

A. Procedural History

Respondent, Dante Carlo Ciruolo, was charged in the Santa Clara County Superior Court, by an information of August 8, 1983, with cultivating and selling marijuana. (Cal. Health & Safety Code, §§ 11358, 11360(a) (J.A. 43-44; C.T. 50.))^{1/}

Ciruolo moved in the trial court to suppress evidence of the cultivation, contending that it was obtained by an

/

/

1. The designation "J.A." refers to the Joint Appendix. "C.T." refers to the Clerk's Transcript on appeal.

unreasonable search and seizure.^{2/}
Specifically, he argued that police aerial observation of a marijuana garden within his home's fenced yard was an illegal search, and that evidence later seized from the property under a search warrant was suppressible fruit thereof. (C.T. 25-30.)

The motion was submitted on the search warrant, the search warrant affidavit, (J.A. 4-15, 48-49; C.T. 40, 72) and the transcript of the preliminary hearing. (J.A. 16-42, 49-50; C.T. 72.) The motion was denied on August 30, 1983. (J.A. 65.)

On October 4, 1983, Ciraolo withdrew his not guilty plea and entered a plea of guilty to cultivating marijuana conditional upon dismissal of the selling

2. The motion did not involve the charge of selling marijuana which resulted from a separate investigation. (C.T. 42, 52-69.)

charge (C.T. 92; R.T. [Oct. 4, 1983]: 1-10.) On November 9, 1983, Ciraolo was granted probation for a period of three years. (C.T.; R.T. [Nov. 9, 1983]: 11-12.)

On January 6, 1984, Ciraolo appealed to the California Court of Appeal, pursuant to California Penal Code section 1538.5(m), from the order denying his motion to suppress evidence. (J.A. 66-67.) On November 20, 1984, Division Five of the California Court of Appeal, First Appellate District, reversed the judgment of conviction. Suppressing the evidence, the court held that the aerial observation was a warrantless search violating the Fourth Amendment. (Pet.App. A20.) The California Supreme Court denied a hearing over one justice's dissent. (Pet.App. C.)

B. Facts

On September 2, 1982, Detective John Schutz of the Santa Clara Police Department received an anonymous phone complaint. The message read: "Can see grass growing in yard, Stebbins by Clark, S/B on left." (J.A. 11, 30.)

Detective Schutz, a policeman for eight years, was assigned to the Narcotics Division. (J.A. 8-9.) Schutz was trained in marijuana identification and cultivation. (J.A. 9, 21.) He had assisted eradication efforts by the Santa Clara County Narcotics Task Force and was familiar with identifying marijuana gardens in rural and urban areas. (J.A. 9.) Schutz had also reviewed numerous aerial photographs of marijuana gardens locally and on special assignment in Hawaii. (J.A. 9-10.)

Through his training and experience, Schutz was aware that marijuana growers

frequently conceal their gardens within greenhouses, among other plants and behind elevated fences. (J.A. 11-12.)

As a result of the phoned complaint, Schutz investigated the property at 2085 Clark Avenue; a house at Clark Avenue's northeast intersection with Stebbins Avenue in Santa Clara. (J.A. 7-8, 11.) That property had a six foot perimeter fence. From the street, Schutz could see a fifteen foot wide inner fence connecting the perimeter fence to the northwest corner of the house. That extension was elevated three to four feet by bamboo stakes precluding vision into the backyard from Schutz's position. (J.A. 11-12, 37-38; C.T. 40.)

Schutz had compiled ten to twelve other complaints of marijuana gardens at Santa Clara residential properties. (J.A. 30, 39.) Consequently, in the

afternoon of September 2, 1982, Schutz and Narcotics Agent Rodriguez chartered an aircraft and a qualified pilot to observe and photograph those properties from the air. (J.A. 12, 13, 30-31.)

The aerial observations were made under circumstances described by Schutz as follows:

"We were extremely busy with plotting our direction. We had a number of different places to go. We had to watch for other aircraft. We were in a flight line with the San Jose airport. And all I recall is plotting these various locations on my map; attempting to get the [sic] one point after another, without tying up air traffic too long." (J.A. 38.)

The aircraft maintained an altitude in excess of 1000 feet above ground level. (J.A. 12, 31-33.) Without visual aids, Detective Schutz and Agent Rodriguez identified, by its highlighted green color, a 15 by 25 foot marijuana garden of 8 to 10 foot tall plants in

the backyard of 2085 Clark Avenue. (J.A. 12-14, 32-33, 36.) The officers photographed the garden using a thirty-five millimeter camera (J.A. 13, 33-38; C.T. 40).^{3/} Five other marijuana gardens were identified elsewhere in Santa Clara. (J.A. 39.)

Schutz obtained a search warrant for 2085 Clark Avenue on September 8, 1982. (J.A. 4-6, 20-21.) Respondent Ciruolo was in the house when the warrant was served the following day. (J.A. 20-21, 23-25.) Evidence of Ciruolo's occupancy

3. The oblique-angle photograph, attached to the search warrant affidavit in this case, pictures 2085 Clark Avenue at the approximate center. In the backyard, a large, circular, doughboy pool separates the marijuana garden (situated beneath a telephone pole) from a patio area partially shaded by an outdoor umbrella. The fifteen foot wide extension to the perimeter fence at the home's rear corner, seen by Schutz from the street, separates the larger side yard containing an unidentified structure from the marijuana garden. (C.T. 40; J.A. 48-49.)

was found there. (J.A. 21-23.) Seventy three cultivated marijuana plants, averaging eight feet tall, were seized from the back yard. (J.A. 21, 40.)

C. Judgment of the California Court of Appeal

In its opinion, the California Court of Appeal quoted from Katz v. United States, 389 U.S. 347, 351-352 (1967): "[W]hat a [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 161 Cal.App.3d at 1088, 208 Cal.Rptr. at 96-97; Pet.App. A14. The court also quoted from Oliver v. United States, 466 U.S. ___, 80 L.Ed.2d 214, 225, 104 S.Ct. 1735, 1742 (1984): "The distinction [between open fields and curtilage] implies that . . . the curtilage . . . warrants the Fourth Amendment protections that attach to the home." People v. Ciruolo, 161 Cal.App.3d

at 1089; 208 Cal.Rptr. at 97; Pet.App. A17.

The lower court reasoned:

"Defendant's backyard is within the curtilage; the height and existence of the two fences constitute objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." 161 Cal.App.3d at 1089; 208 Cal.Rptr. at 97; Pet.App. A17.4/

The court, however, qualified this conclusion: "From the perspective of defendant's reasonable expectation of privacy we deem it significant that the

4. The court's reference to "two fences" appears to have followed from a conception of defendant's property as containing separate inner and outer fences each enclosing the backyard. (see, 161 Cal.App.3d at 1085; 208 Cal.Rptr. at 94; Pet. App. A2.) If the court made such an error it is unimportant. The fence bordering the marijuana garden rose to a height of about ten feet. (J.A. 37.)

aerial surveillance . . . was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within defendant's curtilage." 161 Cal.App.3d at 1089; 208 Cal.Rptr. at 97; Pet.App. A18-19.

Distinguishing this case from "observation of an open corn field which also contains a cannabis crop", the court perceived itself as "confronted instead with a direct and unauthorized intrusion into the sanctity of the home." 161 Cal.App.3d at 1089-1090, 208 Cal.Rptr. at 97-98; Pet. App. A19 [fn. omitted].

SUMMARY OF ARGUMENT

The curtilage doctrine protects against warrantless physical intrusions into the home. A fence does not preclude all government views of

curtilage from outside. A person may reasonably expect that an officer will not jump a fence or place a ladder against it. However, it does not follow that police in aircraft can never look into the yard. Thus, the fact that something would be unseen by police but for their use of an airplane does not constitutionally fulfill the mere hope that it will not be seen. Although this was Ciruolo's actual expectation, it is not one which society accepts as reasonable, especially when, as here, there exists specific justification for focusing upon his particular yard.

There is no reason why police should be precluded from observing what would be entirely visible to them as private citizens from the same vantage point. Texas v. Brown, 460 U.S. 730, 740 (1983). Such an observation notes something outside the home that was

voluntarily exposed to anyone who looked.

United States v. Knotts, 460 U.S. 276,
281 (1983); Katz v. United States, 389
U.S. at 351.

The Court of Appeal's constitutionally protected area analysis erroneously hinges upon one's ability to close a yard to ground view and upon the characterization of an aerial observation as either directed or routine. Both criteria, uniformly rejected by other courts, would protect a few from being viewed by police performing what society considers to be activity open to view. Yet, these criteria fail to protect the many from aerial observations which are truly invasive of legitimate privacy expectations in the home.

Aerial observation of cartilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses

those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.

That is not this case. Nothing was discovered in Ciraolo's yard that was concealed from aircraft. The police did not forfeit their right to observe, as they can on any routine aerial patrol, merely because they suspected Ciraolo in advance. Ciraolo's hope that police would not see is not protected by the Fourth Amendment.

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ARGUMENT

THE AERIAL OBSERVATION DID NOT
INTRUDE INTO LEGITIMATE PRIVACY
EXPECTATIONS AND, THEREFORE,
DISCOVERY OF CIRAOLLO'S
MARIJUANA GARDEN DID NOT
VIOLATE THE FOURTH AMENDMENT

- A. Ciruolo's Expectation That
Police Would Not See His
Marijuana Garden Is
Unreasonable

The term curtilage defines that area to which extends the "intimate activity" of the home. Oliver v. United States, 466 U.S. at ___, 80 L.Ed.2d at 225; 104 S.Ct. at 1742. The Fourth Amendment precludes warrantless physical entries by police into curtilage made with a purpose to indiscriminately seize items or rummage through goods and articles that were expectedly private. See, Coolidge v. New Hampshire, 403 U.S. 443, 474-475 (1971) (car in driveway seized and contents searched); Taylor v. United States, 265 U.S. 57, 59 (1924) (entry into detached garage); Cf., Hester v.

United States, 265 U.S. 57, 59 (1924) (abandoned containers). The Fourth Amendment's primary concern is with physical entry into the home which, by its nature, lays bare the "privacies of life". Payton v. New York, 445 U.S. 573, 583 (1980), quoting Boyd v. United States, 116 U.S. 616, 630 (1886).

This Court has never held those privacies violated merely because police intentionally view curtilage. E.g., United States v. Santana, 427 U.S. 38, 42 (1976); Hester v. United States, 265 U.S. at 59. Nor does the Fourth Amendment prohibit police from entering navigable airspace to survey curtilage.

The California court seemingly conceded that in contrasting this case with routine aerial patrol. Saying something is "in the curtilage" means only that protection may be demanded

from warrantless physical intrusions which is not afforded in "open fields". Oliver v. United States, 466 U.S. at ___, 80 L.Ed.2d at 224, 104 S.Ct. at 1741. Thus, physically nonintrusive aerial observation of curtilage does not, standing alone, violate the Constitution.

The California Court of Appeal, while not disputing this, believed that Ciraolo's fence precluded aerial observation directed at his curtilage. Because Ciraolo concealed his marijuana from ground observation he exhibited a legitimate expectation of privacy from such directed observations, according to the lower court. This theory will not fly.

"[A]n expectation of privacy, strictly speaking, consists of a belief that uninvited people will not intrude in a particular way." United States v.

Lyons, 706 F.2d 321, 326 (D.C. Cir. 1983) (emphasis orig.); accord, Dow Chemical Co. v. United States, 749 F.2d 307, 312-313 (6th Cir. 1984), cert. granted, ___ U.S. ___, ___ L.Ed.2d ___, 105 S.Ct. 2700. Thus, a fence protects against a roving peeping tom, but not against a citizen on a nearby hillside, or police in the air, following a report of suspicious activity within.

That an individual "chooses to conceal assertedly 'private' activity", Oliver v. United States, 466 U.S. at ___, 80 L.Ed.2d at 227, 104 S.Ct. at 1743, does not establish that an observation by police works an infringement "upon the personal and societal values protected by the Fourth Amendment." Id. This is as true of

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curtilage as it is open fields.^{5/}

A residential fence is a reference useful to assess initially whether privacy was expected at all, and, if so, from what. It is one thing to say that police cannot climb a residential fence, State v. Boynton, 574 P.2d 1330, 1333-1334 (Haw. 1978), or peer through a narrow aperture in it. People v. Lovelace, 116 Cal.App.3d 541, 548-555,

5. Even in the context of physical intrusions into curtilage, the fact that one's surroundings afford some measure of privacy does not mean that, absent exigent circumstances, police can never enter nor that they must blind themselves when they do. See, United States v. Roberts, 747 F.2d 537, 542-543 (9th Cir. 1984); United States v. Magana, 512 F.2d 1169, 1170-1171 (9th Cir. 1975), cert. denied, 423 U.S. 826; United States v. Ventling, 678 F.2d 63, 65-66 (8th Cir. 1982); Ellison v. United States, 206 F.2d 476, 478 (D.C. Cir. 1953); People v. Bradley, 1 Cal.3d 80, 85, 81 Cal.Rptr. 457, 459, 460 P.2d 129, 131 (1969); State v. Lyons, 307 S.E.2d 285, 286 (Ga.App. 1983); State v. Nine, 315 So.2d 667, 670-672 (La. 1975); State v. Crea, 233 N.W.2d 736, 739 (Minn. 1975); People v. Smith, 487 N.Y.S.2d 210, 213 (A.D. 4 Dept. 1985).

172 Cal.Rptr. 65, 68-73 (1981). It is quite another thing to say that police cannot fly and look down. The difference is that the former activities invades expectations that are recognized, endorsed and permitted by society. The latter activity ordinarily does not.

This Court stated in Oliver:

"Since Katz v. United States, 389 U.S. 347 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectations of privacy'. 389 U.S. at 360 (Harlan, J., concurring.) The Amendment does not protect the merely subjective expectation of privacy, but only 'those expectations that society is prepared to recognize as "reasonable"'. Id. at 361. See also, Smith v. Maryland, 442 U.S. 735, 740-741 (1979)." 466 U.S. at ___, 80 L.Ed.2d at 223; 104 S.Ct. at 1740.

Tested by this measure, Ciruolo did not have a legitimate expectation of privacy from the aerial observation of

his garden. First, Ciraolo could not have rationally believed the existence of an item the size of his garden was private from air observation. Rather, he subjectively assumed that its exposure to aircraft risked casual observation but not its identification as marijuana. Katz, however, expected his phone conversation would be undisclosed to all outsiders just as Coolidge did not expect that his automobile would be inventoried by police or anyone else trespassing his driveway.

"The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." United States v. Jacobsen, 466 U.S. ___, ___, 80 L.Ed.2d 85, 100, 104 S.Ct. 1652, 1661

(1984) [fn. omitted.] Ciraolo's personal expectation lacks any basis in "concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas v. Illinois, 439 U.S. 128, 144, fn. 12 (1978). His hope that a garden "clearly and contemporaneously visible from the same aerial vantage point", United States v. Bassford, 601 F.Supp. 1324, 1332 (D. Maine 1985), as occupied by police would not attract attention, is no different than any other expectation of nondiscovery. What "a person knowingly exposes, even in his home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. at 351.

When police flying in navigable airspace in a physically nonintrusive manner see readily discernable objects in the curtilage, the observation

involves no deprivation of the home's security. Exposure of such things as 8-10 foot plants in an open air garden by their very nature, renders them visible to police like anyone else.

Such an observation is no different than cases where police position themselves on a raised embankment, United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), cert. denied, 416 U.S. 936; a neighbor's porch, United States v. McMillon, 350 F.Supp. 593, 596-597 (D.C. 1972); a neighboring upper story window, Dillon v. Superior Court, 7 Cal.3d 305, 309-312, 102 Cal.Rptr. 161, 164-165, 497 P.2d 505, 508-509 (1972); Commonwealth v. Williams, 396 A.2d 1286, 1290-1291 (Pa.Super. 1978), rev'd on related ground, 431 A.2d 964, 966 (Pa.1981) (use of "startron"); an adjacent public tennis court and hill, State v. Holbron, 648 P.2d 194, 196 (Haw.

1982); or just off a front sidewalk. United States v. Johnson, 561 F.2d 832, 840-842 (D.C. Cir. 1977) (en banc), cert. denied, 432 U.S. 907. The view from police aircraft is generally no more invasive than one from any other position outside curtilage. There is nothing outrageous or unacceptable in the fact that police see what is obvious and patent.

B. Police Were In A Public Place Open To Their Use

The Court of Appeal did not challenge the right of police to use navigable airspace. Congress has provided that every citizen has a public right of transit through that space. 49 U.S.C., § 1304.6/

6. Where the federal government has not been granted or assumed sovereignty in the airspace, California exercises sovereignty. (Cal.Pub.Util. Code,

(Footnote 6 continued on next page)

Ciraolo's fence does not make the airways any less open to police. The fact that police found it necessary to

Footnote 6 continued:

§ 21401.) State law provides for a public right to use airspace for flight. (Cal.Pub.Util Code, § 21401-21403.) The Federal Aviation Administration provides for altitude regulation of aircraft in airspace. As pertinent to this case, the regulations require a minimum altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. (14 C.F.R., § 91.79(b).) The fact that the officer is in a public place is not the whole answer. It is, however, relevant to the initial determination of whether that seen was expectedly private.

"[W]hen police surveillance takes place at a position which cannot be called a 'public vantage point', i.e., when the police--though not trespassing upon the defendant's curtilage--resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would ordinarily be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what Katz is all about." 1 LaFare, Search and Seizure: A Treatise on the Fourth Amendment, § 2.3, 304-305 (1978) (fn. omitted) (emphasis added). Certainly no greater rights attach to the curtilage than to the interior of the home.

reposition themselves in order to obtain a view is immaterial.

In Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974), a health inspector without warrant entered the outdoor premises of a plant to observe smoke emanating from the chimneys. This Court found no search. It distinguished entries into private spaces to inspect equipment or papers. Id., at 864-865. The inspector was not in an area "from which the public was excluded" and observed what "anyone in the city . . . near the plant could see." Id., at 865. The Court did not rest its conclusion on whether the observations would have been possible "but for" the inspector's position on plant property: "Depending upon the layout of the plant, the inspector may operate within or without the premises

but in either case he is well within the 'open fields' exception" Id.

The same result follows where officers look into enclosures. In Texas v. Brown, 460 U.S. 730 (1983) (plurality opinion), a policeman "shifted his position in order to obtain a better view" and "bent down at an angle so [he] could see what was inside" the glove compartment of an automobile. Id., at 734, 740. This activity was held to be "irrelevant to Fourth Amendment analysis". Id., at 740. The officer was properly in a position from which he could view the compartment:

"The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring);

Smith v. Maryland, 442 U.S. 735, 739-745 (1979); shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search" Id., at 740.

Here, as in Western Alfalfa and Brown, investigators went to an open place from which they and the public alike could see Ciruolo's garden. The fact that police used an airplane, without which Ciruolo's garden might have remained unseen, makes no difference.

In United States v. Knotts, 460 U.S. 276 (1983), police located a container of chloroform outside the defendant's cabin by monitoring a beeper in the container from a helicopter after losing sight of a vehicle transporting the

chemical.^{7/} While recognizing that Knotts had the "traditional expectation of privacy within a dwelling place", Id., at 282, the dispositive fact was that "no indication [existed] that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." Id., at 285. Since visual surveillance "from public places . . . adjoining Knott's premises" could have revealed the presence of the chemicals on the property, the use of the beeper to determine the location of the chloroform was not a search. Id., at 282, 284.

7. The Court of Appeal's decision reflects that the chloroform drum was beneath a wooden barrel in the cabin's yard. United States v. Knotts, 662 F.2d 515, 518 (8th Cir. 1981), rev'd, 460 U.S. 276, 285.

This Court soon after Knotts ruled beeper-monitoring of a container inside the home unlawful. United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984). In Karo, the Court explained that officers could not make a warrantless entry to verify the container's presence there. "For purposes of the [Fourth] Amendment, the result is the same where, without a warrant, the Government employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." 468 U.S. at ___, 82 L.Ed.2d at 541, 104 S.Ct. at 3303. "The case is thus not like Knotts, for there the beeper told the authorities nothing about the interior of Knotts' cabin." 468 U.S. at ___, 82 L.Ed.2d at 542, 104 S.Ct. at 3304.

The airplane here, like the beeper monitoring in Knotts, revealed something outside defendant's residence that was "'voluntarily conveyed to anyone who wanted to look'". Id., quoting, United States v. Knotts, 460 U.S. at 281.^{8/} Conversely, it revealed nothing inside Ciraolo's house. Ciraolo's fence, necessitating aerial survey, is no more relevant than the failure of the visual surveillance in Knotts, where police found an object on the defendant's premises "when they would not have been able to do so had they relied solely on

8. See also, Smith v. Maryland, 442 U.S. 735, 743-744 (1979) (telephone numbers); United States v. Miller, 425 U.S. 435, 442-444 (1976) (bank records); United States v. Choate, 576 F.2d 165, 175-180 (9th Cir. 1978), cert. denied, 439 U.S. 953; reiterated, 619 F.2d 21, 22 (9th Cir. 1980), cert. denied, 449 U.S. 951 (mail cover); United States v. Hoffa, 436 F.2d 1243, 1247 (7th Cir. 1970); cert. denied, 400 U.S. 1000 (mobile telephone unit call over public frequency).

their naked eyes." United States v. Knotts, 460 U.S. at 285.

Knotts is clear: nothing in the Fourth Amendment requires police to forego aids which render perceptible to them what was exposed to everyone. To the extent an airplane is simply another aid, like binoculars or telescopes, its use was unobjectionable.

In United States v. Lee, 274 U.S. 559, 563 (1927), this Court indicated that magnification tools generally involve no Fourth Amendment violation. Lee was cited in Katz, 389 U.S. at 351, and has since been quoted in Texas v. Brown, 460 U.S. at 740 and United States v. Knotts, 460 U.S. at 283. Accordingly, using binoculars or telescopes to view grounds, including fenced residential yards, from outside

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curtilage is not ordinarily a search.^{9/}
In the absence of a legitimate expectation of privacy, police may use binoculars to view objects inside homes or other structures.^{10/} Where, however, it is legitimately expected that nobody

9. United States v. Lace, 669 F.2d 46, 50-51 (2d Cir. 1982); cert. denied, 455 U.S. 854; United States v. Minton, 488 F.2d at 38 (barn); People v. Vermouth, 42 Cal.App.3d 353, 361-362, 116 Cal.Rptr. 675, 680 (1974) (sun deck); Sims v. State, 425 So.2d 563, 567 (Fla.App. 1982) (yard), pet. for reversal denied, 436 So.2d 100 (Fla. 1983); State v. Holbron, 648 P.2d at 196-197 (fenced backyard), see also, United States v. Hensel, 699 F.2d 18, 41 (1st Cir. 1983); cert. denied, 461 U.S. 958 (cases cited but point waived.)

10. Fullbright v. United States, 392 F.2d 432, 433-436 (10 Cir. 1968), cert. denied, 393 U.S. 830 (shed); United States v. Christensen, 524 F.Supp. 344, 346-348 (N.D. Ill. 1981) (business); United States v. Bifield, 498 F.Supp. 497, 506-508 (D. Conn. 1980), aff'd, 659 F.2d 1063 (2d Cir. 1981) (unpublished) (gas station); Cooper v. Superior Court, 118 Cal.App.3d 499, 509-510, 173 Cal.Rptr. 520, 525-526 (1981) (home); People v. Hicks, 364 N.E.2d 440, 444

(Footnote 10 continued on next page)

could otherwise see the minute items and activities within a home that were revealed by binoculars and telescopes, courts have found a search.^{11/} The latter cases, whatever their merit may be, are concerned with visual aids revealing things inside the home that were demonstrably private to all outsiders. Ciruolo's garden, outside

Footnote 10 continued:

(Ill.App. 1977) (hotel room); State v. Thompson 241 N.W.2d 511, 513 (Neb. 1976) (house); Commonwealth v. Hernley, 263 A.2d 904, 906-907 (Pa.Super. 1970), cert. denied, 401 U.S. 914 (printshop); Commonwealth v. Williams, 396 A.2d at 1290-1291 (apartment); State v. Manly, 530 P.2d 306, 309 (Wash., 1975) (apartment).

11. United States v. Taborda, 635 F.2d 131, 139 (2d Cir. 1980); United States v. Kim, 415 F.Supp. 1252, 1256 (D. Haw. 1976); People v. Arno, 90 Cal.App.3d 505, 509-512, 153 Cal.Rptr. 624, 626-628 (1979); State v. Ward, 617 P.2d 568, 570-573 (Haw. 1980); State v. Blacker, 630 P.2d 413, 414-415 (Or.App. 1981); see also, People v. Ciochon, 319 N.E.2d 332, 334-336 (Ill.App. 1974) (remanded for evidentiary hearing).

the home, was just the opposite.

C. Both The Protected Area And
Directed Search Rationales
Of The Court Of Appeal
Should Be Rejected

The California court found that Ciraolo's fence established a legitimate expectation of privacy "by any standard". (Pet.App. A17.) It was a protected area. The court then qualified the legitimacy it had just conferred by emphasizing that the observation was directed at Ciraolo's yard and not the result of "routine patrol". (Pet.App. A18-19.) Neither of these "tests" should be adopted.

Protected Area

This Court recognized in Oliver v. United States, 466 U.S. at ___, 80 L.Ed. at 224, 104 S.Ct. at 1741 that both the "public and police lawfully may survey lands from the air [citations]". As to aerial observation, Oliver drew no distinction between open fields and

curtilage. Land of each type is frequently fenced.^{12/} Whether marijuana crops are fenced in open fields or curtilage, they are equally visible to police from aircraft.

Moreover, "[i]n most cases it would be impracticable to view one without contemporaneously viewing the other." United States v. Bassford, 601 F.Supp. at 1332. Likewise, in many cases, police will "have to guess . . . whether landowners had erected fences sufficiently high . . . to establish a right of privacy." Oliver v. United States, 466 U.S. at ___, 80 L.Ed.2d at 226, 104 S.Ct. at 1742-1743.

The lower courts have consistently upheld unobtrusive aerial observation of

12. "An open field need be neither 'open' nor a 'field' as those terms are used in common speech." Oliver v. United States, 466 U.S. at ___, n. 11, 80 L.Ed.2d at 225, n. 11, 104 S.Ct. at 1742, n. 11.

curtilage closed to ground view.^{13/} These decisions repeatedly emphasize that it is, ultimately, the nature of the government's activity, not the measures taken to conceal objects from ground

13. United States v. Bassford, 601 F.Supp. at 1328-1332, 1334-1335 (D. Maine 1985) (marijuana gardens 10 and 5 feet from two homes in a heavily wooded, posted, 30-acre property); Randall v. State, 458 So.2d 822, 824-826 (Fla.App. 2 Dist. 1984) (marijuana in backyard of duplex apartment behind reed fence); State v. Stachler, 570 P.2d 1321, 1326-1329 (Haw. 1977) (8 to 10 foot tall marijuana patch 15 feet from secluded home in remote area); State v. Rogers, 673 P.2d 142, 143-144 (N.M.App. 1983) (plants protruding from greenhouse near house within fence); Cf. People v. Sneed, 32 Cal.App.3d 535, 540-543, 108 Cal.Rptr. 146, 149-151 (1973) (helicopter hovered 20 to 25 feet over corral 125 feet behind house; rev'd.)

Other cases have affirmed without stopping to examine whether the area was curtilage although the facts did not preclude that possibility. E.g., United States v. Allen, 675 F.2d 1373, 1380-1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (aerial photography of modifications to a barn not observable outside 200 acre ranch on sea coast); United States v.

(Footnote 13 continued on next page)

view, which controls.^{14/} Police should be permitted to observe "conspicuous and readily identifiable" evidence of crime in a residential yard. People v. Superior Court (Stroud), 37 Cal.App.3d 836, 839, 112 Cal.Rptr. 764, 765 (1974).

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Footnote 13 continued:

Hensel, 699 F.2d 18, 41 (1st Cir. 1983), cert. denied 461 U.S. 958 (air observation of property containing several buildings, garage and deep water dock), State v. Davis, 627 P.2d 492, 493-494 (Or.App. 1981), pet. denied, 634 P.2d 1346 (Or. 1981) (marijuana 150 to 300 feet from secluded residences with signs and locked gate); see also, State v. Cockrell, 689 P.2d 32, 33-34 (Wash. 1984) (state constitution).

14. "There is almost uniform agreement, among those who have considered the question, that an attempt to exclude ground-based observation fails to demonstrate an expectation of privacy from the air." Comment, Aerial Surveillance: A Plane View of the Fourth Amendment, 18 Gonz.L.Rev. 307, 324, n. 100 (1982-83) (cases cited.)

Directed Search

The analytic basis for the directed search rationale is unclear. Neither Ciruolo nor the California court have offered authority for it.^{15/}

Its source may be the plurality portion of the opinion in Coolidge v. New Hampshire, 403 U.S. 443 which states

15. It is unclear whether Ciruolo is disengaging himself on this point, however slightly, from the California court's holding. In his most recent briefs, Ciruolo emphasizes that the tip was "nonspecific", "unvalidated" and "anonymous". (Ans. to Pet. for Hg. [filed Jan. 8, 1985] 3; Cert. Opp. 5). This may only be rhetoric to obscure the fact that police acted on particularized suspicion that a specific crime was taking place rather than on random curiosity to see inside this yard. On the other hand, it may signal Ciruolo's discomfort with the logical endpoint of the Court of Appeal's analysis: acting on suspicion to observe one yard from the air is bad while acting on none to observe all is good. Whatever Ciruolo means, we take the lower court's opinion holding "the warrantless overflight . . . an unreasonable search" (Pet.App. A20) at face value. If looking at a particular yard is the real evil, then a specific, validated and known tip, i.e., probable cause, will not excuse a warrant.

that "the discovery of evidence in plain view must be inadvertent." Id., at 470. However, that language distinguished two sorts of seizures and has no application here:

"It is important to distinguish 'plain view', as used in Coolidge to justify seizure of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search [citations], the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. In turn, these levels of suspicion may, in some cases, [citations], justify police conduct affording them access to a particular item." Texas v. Brown, 460 U.S. at 738, n. 4 (emphasis orig.); see also, Id., at 751, n. 4 (Stevens, J., concurring in judgment); 1 LaFave, Search and Seizure, § 2.2(a) 241-243.

"[T]he purpose of the Fourth Amendment is to guard against arbitrary

governmental invasions of the home . . . regardless of the purpose for which that entry is sought." Payton v. New York, 455 U.S. at 582, n. 17 (1980). It is a strange rule which recognizes legitimate privacy expectations "by any standard" (Pet.App. A17), but excuses their violation if police intrude on a "routine", i.e., arbitrary, basis.^{16/}

16. If preservation from disclosure to government of objects enclosed in fenced yards is the key value, the intention of police to see those objects on routine air patrol surely precludes achieving that goal. Thus, contrary to the California court, the intention of government to see into a specific enclosure is irrelevant, unless we indulge the peculiar notion that residents will be idiosyncratically comforted knowing that police are not looking because of a tip. It is due to this logically irreconcilable aspect of the California court's decision, plus the fact that it ambiguously characterized the directed nature of the flyover to be "significant" (Pet. App. A18), not necessarily dispositive, that we suspect exclusionary rule concerns lurk beneath a mask of privacy expectation analysis. The California court might just as well

(Footnote 16 continued on next page)

Inadvertence is routinely rejected as a requirement for a lawful aerial

Footnote 16 continued:

have said that all aerial observations of fenced residential yards are searches but only directed flyovers can be deterred by a warrant requirement.

That the court did not render its holding in such form is probably more meaningful than what it did say. First, it would imply that Ciraolo's expectation of privacy is, at best, so abstract and theoretical that, in general, the cost to society of its enforcement through exclusion of evidence is prohibitive. Second, it would leave open the possibility of civil remedies against routine air patrol that are unacceptable to anyone except criminals. Third, it would make crystal clear that police could avoid exclusion if they dissemble about the degree to which they focused on a specific fenced yard; a puzzle this Court avoided solving by keeping a gnomonic silence on just how significant directed flyovers are. Fourth, it would render the uncomfortable implications of its decision too plain to require closer scrutiny: something has gone very wrong with the Fourth Amendment when the eminently reasonable police activity in this case is outlawed but, by only modest logical extension, legitimacy is conferred on "random" enhanced viewing of a whole neighborhood of unfenced yards from a government satellite in geosynchronous orbit.

observation. Randall v. State, 458 So.2d at 825; State v. Stachler, 570 P.2d at 1327; State v. Layne, 623 S.W.2d 629, 635 (Tenn.Cr.App. 1981). Indeed, receipt of information causing police to focus on specific property adds to the flight's justification. United States v. Marbury, 732 F.2d 390, 399 (5th Cir., 1984); United States v. Allen, 675 F.2d at 1381; United States v. DeBacker, 493 F.Supp. 1078, 1081 (W.D. Mich. 1980); State v. Rogers, 673 P.2d at 144.

D. Police Did Not Violate
A Legitimate Privacy
Expectation

Our society expects police to survey residential areas from aircraft to enforce criminal laws. In no sense, does society acknowledge that crime flourishing in view of everyone leaves police helpless to act whenever a fence is built.

Absent invasive procedures, no privacy interest is advanced by fictionally protecting what can readily be seen by anyone in an aircraft in navigable space, including police on patrol. Once it is seen, every reason permits the officer to scrutinize it with every means at hand.^{17/} "[W]hat is

17. In the proper discharge of his duty, such activity serves to avoid the risk of misdescription of what has been already seen, a risk in which there is no cognizable interest. United States v. Jacobsen, 466 U.S. at _____, 80 L.Ed.2d at 98, 104 S.Ct. at 1659. In this case, for example, the photograph of Ciruolo's neighborhood served to preserve what police had already lawfully seen. Such action violates no legitimate expectation of privacy. State v. Dickerson, 313 N.W.2d 526, 532 (Iowa 1981); Annot., Employment of Photographic Equipment to Record Presence and Nature of Items as Constituting Unreasonable Search, 27 A.L.R. 4th 532 (1984); see, United States v. Allen, 675 F.2d at 1380; Cf. United States v. White, 401 U.S. 745, 748-753 (1971) (plurality opinion) (recording in home by informant); United States v. Miller, 753 F.2d 1475, 1480 (9th Cir. 1985) (informant corroborated by aerial photo.)

observable by the public is observable without a warrant, by the Government . . . as well." Marshall v. Barlow's Inc., 436 U.S. 307, 315 (1978).

The potential abuses that Ciraolo says cry out for a magistrate's Fourth Amendment flight plan resonate soundlessly in their absence here. This Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." United States v. Karo, 468 U.S. at ___, 82 L.Ed. 2d at 539, 104 S.Ct. at 3302.

No sophisticated technology exposed intimate secrets of Ciraolo's life, much less imperceptible features of his yard. No physically intrusive activity threatened his private affairs. Police flew in a flight path (J.A. 38), did not swoop low (J.A. 31) nor even use binoculars (J.A. 32). The observation

was nothing more than the view to be had by any other aircraft.

The view of Ciraolo's yard could not have been plainer, the position of police more open, nor their actions more reasonable. There was no search. The Court of Appeal erred.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be reversed.

DATED: August 8, 1985

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CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Petitioner,)	No. 84-1513
)	
v.)	
)	
DANTE CARLO CIRAOLO,)	
)	
Respondent.)	

State of California)
City and County of San Francisco) ss.

LAURENCE K. SULLIVAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on August 8, 1985 true copies of the attached Brief For Petitioner in the above-entitled matter were served on counsel of record by placing same in envelopes addressed as follows:

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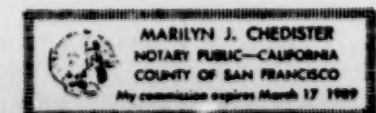
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Subscribed and sworn to before
me this 8th day of August, 1985

Marilyn J. Chedister
NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN FRANCISCO, CALIFORNIA



QUESTION PESENTED

Whether focused and intentional police observation of a private residential yard from an airplane is a search under the Fourth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
MODIFICATION OF QUESTION PRESENTED	1
OPINION BELOW.....	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
A. Facts	1
B. The Case In The Courts Below	4
SUMMARY OF ARGUMENT.....	4
ARGUMENT	5

I

DELIBERATE POLICE INTRUSION INTO A PRIVATE BACKYARD IMPLICATES THE FOURTH AMENDMENT	5
A. A Suburban Backyard Surrounded By A High Fence Is The Core Of The "Curtilage" As That Term Is Used For Purposes Of Interpreting The Fourth Amendment	6
B. The Curtilage Of A Home Is Protected From A Search To The Same Extent As The Home Itself .	7

II

AERIAL SURVEILLANCE OF THE PRIVATE AREAS OF THE CURTILAGE QUALIFIES AS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMEND- MENT	12
A. The Avoidance Of A Physical Intrusion By The Use Of An Airplane Does Not Negate A Fourth Amend- ment "Search."	13
B. The Limited Scope Of The Surveillance Did Not Prevent It From Being A Search	17
1. This Search Was More Intrusive Than The One Held Unconstitutional In <i>United States v.</i> <i>Karo</i>	18
2. The Chilling Effect Of Aerial Surveillance Of Backyards Is Incompatible With The Fourth Amendment	19
3. Only The Warrant Clause Provides Appropri- ate Limits For Technological Surveillance Of Private Areas Without Physical Intrusion ...	22

Table of Contents Continued

	Page
C. Where The Reason For A Warrantless Search Is To Evade The Warrant Requirement, The Search Is Invalid	26
III	
RESPONDENT DID NOT WAIVE HIS FOURTH AMEND- MENT RIGHTS BY FAILING TO ENCLOSE HIS BACK- YARD.....	29
IV	
THE ADMINISTRATIVE WARRANT SOLUTION.....	30
V	
CONCLUSION.....	31

TABLE OF AUTHORITIES

	Page
<i>Air Pollution Variance Bd. v. Western Alfalfa Corp.</i> , 416 U.S. 861 (1974)	12
<i>Barnatto v. State of Nevada</i> , 501 P.2d 643 (1972)	9
<i>Boyd v. United States</i> , 116 U.S. 616, 29 L.Ed. 746, 6 Sup.Ct. 524 (1886)	8
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967)....	23, 31
<i>Care v. United States</i> , 231 F.2d 22 (10th Cir. 1956)	6
<i>Commonwealth of Pennsylvania v. Eshelman</i> , 383 A.2d 838 (1978)	9
<i>Commonwealth v. Simmons</i> , 417 N.E.2d 1193 (Mass. 1981)	9
<i>Davis v. United States</i> , 327 F.2d 301 (9th Cir. 1964)	28
<i>Dean v. Superior Court</i> , 35 Cal.App.3d. 112 (1973)	25
<i>Dow Chemical Co. v. United States</i> , (6th Cir. 1984) 749 F.2d 307	10
<i>Dulek v. United States</i> , (6th Cir. 1926) 16 F.2d 275	11
<i>Fixel v. Wainwright</i> , (5th Cir. 1974) 492 F.2d 480	9
<i>Fulbright v. United States</i> , 392 F.2d 432 (10th Cir. 1968)	11
<i>Gonzalez v. State of Texas</i> , 588 S.W.2d 355 (1979)	9
<i>Harris v. United States</i> , 331 U.S. 145	19
<i>Hayes v. Florida</i> , ____ U.S. ____ (March 20, 1985, 53 L.W. 4382)	19
<i>Hester v. United States</i> , 265 U.S. 57, 68 L.Ed. 898, 44 Sup. Ct. 445 (1924)	8, 11
<i>Katz v. United States</i> , (1967) 389 U.S. 347	12, 13, 14, 15, 20, 30
<i>Kelly v. The State</i> , 147 Ga. App. 179, 245 S.E.2d 872 (1978)	9
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965)....	24
<i>Maine v. Thornton</i> , 466 U.S. ____	6
<i>Michigan v. Clifford</i> , ____ U.S. ____, 52 L.W. 4058 (1984)	26, 27, 28, 31
<i>Nat. Org. for Reform of Marijuana Laws v. Mullen</i> , 608 F.Supp. 945 (D.C. Cal. 1985)	25
<i>Oliver v. United States</i> , 466 U.S. ____, 80 L.Ed.2d 214, 104 Sup.Ct. 1735 (1984)	6, 7, 8, 9, 15, 16
<i>Olmstead v. United States</i> , (1928) 277 U.S. 438	13, 20
<i>People v. Ciraolo</i> , 161 Cal.App.3d 1081 (1984)	1, 9

Table of Authorities Continued

	Page
<i>People v. Sneed</i> , 32 Cal.App.3d 535 (1973)	9, 25
<i>People v. Superior Court (Spielman)</i> , (1980) 102 Cal.App.3d 342, 162 Cal.Rptr. 295	28
<i>Rakas v. Illinois</i> , 439 U.S. 128	16
<i>Randall v. State of Florida</i> , 458 S.2d 822 (D.C. Fla. 1984)	11
<i>Silverman v. United States</i> , (1961) 365 U.S. 505	13
<i>State of Hawaii v. Knight</i> , 621 P.2d 370 (1980)	21
<i>State of New Hampshire v. Hanson</i> , 313 A.2d 730 (1973)	9
<i>State of Oregon v. Blacker</i> , 630 P.2d 413 (1981)	21
<i>State v. Buchanan</i> , 432 S.W.2d 342 (Mo. 1968)	9
<i>State v. Davis</i> , 51 Or. App. 827, 627 P.2d 492 (1981)	9, 14
<i>United States v. Allen</i> , 675 F.2d 1373 (9th Cir. 1980) 6, 11, 29	
<i>United States v. Bailey</i> , 444 U.S. 394 (1980)	8
<i>United States v. Bassford</i> , 601 F.Supp. 1324 (D. Maine 1985)	6, 12
<i>United States v. Broadhurst</i> , ____ F.Supp. ____ (E.D. Cal. June, 21, 1985)	26, 31
<i>United States v. Davis</i> , (5th Cir. 1969) 423 F.2d 974	9
<i>United States v. FMC Corp.</i> , (W.D.N.Y. 1977) 428 F.Supp. 615	9
<i>United States v. Hensel</i> , 699 F.2d 18 (1st Cir. 1983)	11
<i>United States v. Hersh</i> , 464 F.2d 228 (9th Cir. 1972)	28
<i>United States v. Karo</i> , 468 U.S. ____, 82 L.Ed.2d 530, 104 Sup. Ct. 3296 (1984)	17, 18, 19, 20, 23
<i>United States v. Kim</i> , 415 F.Supp. 1252 (D. Hawaii 1976)	21, 31
<i>United States v. Lace</i> , 669 F.2d 46 (2nd Cir. 1982)	11
<i>United States v. Lee</i> , (1927) 274 U.S. 559	20
<i>United States v. Leon</i> , 468 U.S. ____ (1984)	3
<i>United States v. Minton</i> , 488 F.2d 37 (4th Cir. 1973)	11
<i>United States v. Molkenbur</i> , (8th Cir. 1970) 430 F.2d 563	9
<i>United States v. Montoya de Hernandez</i> , ____ U.S. ____, 53 L.W. 5048 (July 1, 1985)	7
<i>United States v. Roberts</i> , 747 F.2d 537 (9th Cir. 1984) ..	11
<i>United States v. Swart</i> , (7th Cir. 1982) 679 F.2d 698	9
<i>United States v. Taborda</i> , 635 F.2d 131 (2nd Cir. 1980) ..	21
<i>United States v. van Dyke</i> , 643 F.2d 992 (4th Cir. 1981) ..	6

Table of Authorities Continued

	Page
<i>United States v. Vilhotti</i> , 323 F.Supp. 425 (S.D.N.Y.) 1971).....	15
<i>United States v. White</i> , 401 U.S. 745 (1971).....	15, 17
<i>United States v. Williams</i> , 581 F.2d 451 (5th Cir. 1978).....	6, 28
<i>Wattenburg v. United States</i> , 388 F.2d 853 (9th Cir. 1968).....	6, 9
<i>Winston v. Lee</i> , 53 L.W. 4367 (1985).....	20
CONSTITUTIONS	
United States Constitution:	
<i>Fourth Amendment</i>	1, <i>passim</i>
OTHER AUTHORITIES CITED	
Amsterdam, <i>Prospectives On The Fourth Amendment</i> , 58 Minn. L. Rev. 349, 403 (1974).....	15
4 Blackstone, Commentaries *225.....	11
Gavison, <i>Privacy And The Limits Of Law</i> , 89 Yale L.J. 421, 423 and n.11 (1980)	22
Grange, <i>Visual Remote Sensing In Privacy Interests Of The Fourth Amendment</i> , 1 Northrup Univ. L.J. 33 (1980)	22
La Fave, <i>Search and Seizure, A Treatise on the Fourth Amendment</i> , (1978)	
Section 2.1	14
Section 2.2(c) and (d).....	21
Section 2.3(c).....	21
P. Kimball, <i>The File</i> (1983).....	24
Thornton, <i>Police Use of Sense-Enhancing Devices And The Limits Of The Fourth Amendment</i> , 1977 Law Forum 1167 (1977)	22
Wasserstrom, <i>The Incredible Shrinking Fourth Amendment</i> , 21 Am. Crim. L. Rev. 257, 301-302, n.220 (1984)	24
6 University of Michigan J.L. Ref. 153, 179-180 (1972) ..	15

MODIFICATION OF QUESTION PRESENTED

Respondent's question presented is slightly different from that presented by petitioner because this case concerns an intentional viewing from the air of a place known to the police to be private. It does not concern an unplanned sighting of alleged contraband from the air, nor does it concern an unfocused police patrol.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Five, is reported at 161 Cal.App.3d 1081, 208 Cal.Rptr. 93 (Pet. App. A).

CONSTITUTIONAL PROVISION INVOLVED

Ordinarily a respondent would not have to repeat petitioner's statement under this heading. However, petitioner has chosen to omit the Warrant Clause in its statement of the Fourth Amendment and therefore respondent states the Amendment in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts

An anonymous telephone message caused an investigation by Detective John Shutz of the Santa Clara Police Department, an officer trained and experienced in marijuana identification and cultivation detection. (J.A. 9, 21.) The message read:

Can see grass growing in yard, Stebbins by Clark, S/B on left [J.A. 11, 30.]

After personally investigating the area, presumably from the public streets and sidewalks, Shutz located a "suspect residence" (J.A. 11) on Clark Avenue.¹ Shutz could not see any marijuana from the street. However, respondent's residence became suspect because of his attempt to preserve his privacy. Shutz believed that marijuana cultivators frequently conceal gardens by elevated fences; respondent's "inner yard" was surrounded by a fence built to a height of approximately ten feet. (J.A. 11-12; 38).

Solely because of the existence of the elevated fence (J.A. 37) Detective Shutz chartered an airplane. Accompanied by Agent R. Rodriguez of the Santa Clara County Narcotics Task Force, an expert in detecting marijuana cultivation from the air, as well as by the pilot of the plane, he flew to the Ciraolo neighborhood. They were able to overcome the security of the fence by visual observation from an altitude of 1,000 feet and by taking a photograph of their view including the neighboring homes and backyards. (J.A. 13; Exh. A to the Search Warrant Affidavit, J.A. 48-49.) They were then able to identify plants as marijuana.

Shutz placed this information in a search warrant affidavit and a warrant issued which was executed at the Ciraolo residence and resulted in a criminal prosecution. Respondent properly moved to suppress the evidence

¹ This appears to be a variance from the tip which placed the yard on Stebbins. The two streets run together as can be seen from the photograph which is Exhibit A to the search warrant affidavit and a part of this record, J.A. 48-49.

obtained from the aerial surveillance.² The viewing and photography of the backyards was without notice to the residents and without authority of a warrant. No attempt to obtain a warrant was made by the searching officers. In addition to the 10-foot inner fence, respondent's backyard had a 6-foot outer fence and was as private as he could make it, considering its suburban setting, without depriving his backyard of sunlight. As shown by the photograph attached to the search warrant, respondent's house itself furnished one border of the inner yard. Except for the Fourth Amendment and FAA safety regulations (*see* note 14, *infra*), nothing in California or federal law limited the overflight as to time, intensity, place, manner, things to be seized or viewed, requirement of notice that it had taken place or written return as to the results.

The search warrant as requested and issued by a magistrate commanded the police to search respondent's entire home, attached garage and ground areas in the most intense manner so as to allow seizure of, *inter alia*, marijuana, "correspondence," and "notes, records, customer lists and price lists, relating to the sales of marijuana." (J.A. 5.)

There was no evidence as to whether other aircraft had flown over respondent's backyard, although at some time during the flight, which focused on a number of other locations in addition to respondent's backyard, Officer Shutz testified that the airplane was "in a flight line with the San Jose Airport." (J.A. 38.)

² This court in granting certiorari specifically declined to review the conclusion of the court below that nothing in *United States v. Leon*, 468 U.S. ____ (1984) allows a search warrant to be grounded on illegally obtained evidence.

B. The Case In The Courts Below

In the trial court, respondent's motion to suppress the evidence was denied. (J.A. 65.) Respondent was convicted on a cultivation of marijuana charge. His sentence was not "probation" as stated at Petitioner's Brief, p. 5, but 120 days in the county jail, \$750 fine, surrender of his rights to be free of unreasonable search and seizure, participation in a counseling program, and probation. (C.T. 93; R.T. 11-12.) His conviction was appealed to the Court of Appeal, First Appellate District, Division Five, which reversed the conviction and ordered suppression of the fruits of the aerial search of the inner backyard on the basis that it violated the Fourth Amendment. *See* Appendix A to the Petition. The court below, viewing the specific intention to breach respondent's protected curtilage as a "direct and unauthorized intrusion into the sanctity of the home," ruled the overflight an unreasonable search in violation of the Warrant Clause of the Fourth Amendment.

SUMMARY OF ARGUMENT

Respondent is entitled to the same protections in his enclosed, suburban backyard as in his home against warrantless searches for crime. Neither the limited scope of the information revealed by the aerial intrusion nor its lack of physical penetration are relevant to depriving respondent of his Fourth Amendment security rights.

Not only respondent's privacy, but an entire social attitude is at risk in this case. We face an explosion in technological advances capable of intruding into those aspects of life normally thought of as free of governmental surveillance unless the surveillance is authorized by a magistrate. Deprived of normally anticipated security, our society will lose values at the core of its strength.

The decision of the police to jump respondent's fence by the warrantless use of an airplane was a deliberate and unnecessary evasion of the warrant requirement for the purpose of gathering evidence of crime. There is no waiver of Fourth Amendment rights by failing to retreat indoors when someone does not wish to be spied upon by the government. Vulnerability to an occasional view from a passing airplane is not comparable to a focused search, by trained experts, in an attempt to gather evidence of crime.

Application of the Warrant Clause to the facts of this case would provide needed protections against unrestrained police investigations using technological advances which interfere with normal concepts of privacy. An administrative warrant solution is also possible where government inspections to enforce the laws are an appropriate enforcement procedure.

ARGUMENT

I

DELIBERATE POLICE INTRUSION INTO A PRIVATE BACKYARD IMPLICATES THE FOURTH AMENDMENT

Only after discovering that one backyard in the area mentioned in the anonymous tip had a fence preventing surveillance from the ground did the police decide to undertake a warrantless intrusion of this private enclave from the air. Under this Court's decisions and the prior law in state and federal courts interpreting the Fourth Amendment, the area targeted for intrusion by the police was (A) within the curtilage of Mr. Ciraolo's home and (B) protected by the Warrant Clause from police intrusion to the same extent as was his home.

A. A Suburban Backyard Surrounded By A High Fence Is The Core Of The "Curtilage" As That Term Is Used For Purposes Of Interpreting The Fourth Amendment.

This is not a case calling for the resolution of the outer perimeters of the sometimes-vague concept of "curtilage." See, e.g., *Wattenburg v. United States*, 388 F.2d 853, 857-858 (9th Cir. 1968) (Wood pile 35 feet from home within curtilage); *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978) (shed 150 feet from home within curtilage); *United States v. van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981) (fence, 150 feet from residence, was the outer boundary of the curtilage); *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956) (cave across a road from the residence not within the curtilage). The brief for the petitioner in this case concedes the police intrusion into Ciraolo's curtilage, Petitioner's Brief, pp. 12-13, 26, arguing only that the curtilage was open to public view. As can be seen from the photograph which is Exhibit A to the search warrant affidavit,³ the alleged marijuana plants were within an arm's reach of Ciraolo's back windows in a small backyard. Our case does not involve the fields of commercial marijuana growers as did *Oliver*, *Thornton*, *Allen* and *Bassford*.⁴ It involves the core area of the curtilage where the home gives private access to natural light and air, the backyard. In the following paragraphs,

³ This photograph is a part of the record before this Court, see J.A. 48-49.

⁴ *Oliver v. United States* and *Maine v. Thornton*, 466 U.S. ____; *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980); *United States v. Bassford*, 601 F.Supp. 1324 (D. Maine 1985). Although the *Bassford* case might involve a backyard, the facts are not clearly described. In any event the Judge in *Bassford* makes it clear that he declines to draw any distinction between curtilage and noncurtilage when it comes to reasonable expectations of privacy from aerial viewing by the police. See 601 F.Supp. 1324, 1331.

we demonstrate from our legal history that society recognizes and protects the privacy of the backyards of homes to the same extent as the interiors of homes.

B. The Curtilage Of A Home Is Protected From A Search To The Same Extent As The Home Itself.

The wording of the Fourth Amendment does not expressly bring the curtilage of a home within its protections; yet there is universal agreement that it is encompassed by those words. A "house" is more than four walls; it includes, at the least, a religious symbol attached to the outside wall, a patio directly leading to the house and an enclosed yard into which the home's residents pass freely while still protected by the security of their home. It is not a "person" or a "paper" and its characterization as an "effect" is unsupported by any historical precedent⁵ or case law. The curtilage, logically and textually, must be considered an inseparable part of the "house."

Putting aside the "open view" exception to (or waiver of) Fourth Amendment protection, it is analytically possible that certain portions of the "house" should be given more stringent protection under the Fourth Amendment than others. However, there is no discussion of such a differentiation in the case law or literature concerning the Fourth Amendment's protection of houses. Nor, respondent believes, is such a differentiation workable or wise. The complexities of the Fourth Amendment are sufficient⁶ without setting still another constitutional stan-

⁵ See *Oliver v. United States*, 466 U.S. ____, 80 L.Ed.2d 214, 223, n.7.

⁶ Cf. *United States v. Montoya de Hernandez*, ____ U.S. ____ 53 L.W. 5048, 5050 (July 1, 1985):

We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal

dard for illegal searches and seizures.⁷

This topic seems controlled by the recent decision in *Oliver v. United States*, 466 U.S. —, 80 L.Ed.2d 214, 104 Sup.Ct. 1735 (1984). There the Court stated at 80 L.Ed.2d 225:

The distinction [between "open fields" and "curtilage"] implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections *that attach to the home*. (Emphasis supplied.)

This statement makes the protections accorded to the home by the Fourth Amendment applicable to protect the privacy of the curtilage. No distinction is drawn between the home and the curtilage for Fourth Amendment purposes:

At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630, 29 L.Ed. 746, 6 Sup.Ct. 524 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage. . . . [*Oliver, supra*, 80 L.Ed.2d at 225]

Neither the holding of *Oliver* nor the rule of *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 Sup.Ct. 445 (1924) reaffirmed in *Oliver*, applies "in the area imme-

standard in addition to "reasonable suspicion" and "probable cause"; we are dealing with a constitutional requirement of reasonableness, not *mens rea*, see *United States v. Bailey*, 444 U.S. 394, 403-406 (1980), and subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.

⁷ Page 26 of the Brief for Petitioner argues that "certainly no greater rights attach to the curtilage than to the interior of the home." (Emphasis supplied.) Respondent agrees.

diately surrounding the home." *Oliver, supra*, 80 L.Ed.2d at 224.⁸

As demonstrated by the three circuit court cases referred to by this Court in its *Oliver* opinion to illustrate the Fourth Amendment's protection of the curtilage (80 L.Ed.2d at 225), the lower federal courts have drawn no distinction between the Fourth Amendment protections afforded the curtilage and those afforded the home. See also to the same effect, *United States v. Molkenbur* (8th Cir. 1970) 430 F.2d 563, 566; *Wattenburg v. United States* (9th Cir. 1968) 388 F.2d 853, 857; *Fixel v. Wainwright* (5th Cir. 1974) 492 F.2d 480; *United States v. Swart* (7th Cir. 1982) 679 F.2d 698; *United States v. Davis* (5th Cir. 1969) 423 F.2d 974, 976-977; *United States v. FMC Corp.* (W.D.N.Y. 1977) 428 F.Supp. 615.

The laws in the various states are also generally interpreted to give an enclosed curtilage the same privacy protection as the home.⁹

⁸ It was conceded in *Oliver* and its companion case that the property searched was not within the curtilage. In footnote 11 of *Oliver* this Court left open the possibility that a different "degree" of Fourth Amendment protection might be afforded the curtilage as opposed to the home itself. Respondent argues above that the creation of a different degree of protection for the curtilage would be unwise and unprecedented. Petitioner does not argue for such a differing degree of protection nor has any case or discussion in the literature suggested a practicable means of discrimination on degrees of privacy between the different portions of the home.

⁹ See, e.g., *People v. Ciruolo*, 161 Cal.App.3d 1081, 1089-1090 (1984); reproduced in the Appendix); *People v. Sneed*, 32 Cal.App.3d 535, 542 (1973); *Kelly v. The State*, 147 Ga. App. 179, 245 S.E.2d 872, 875 (1978); *Commonwealth v. Simmons*, 417 N.E.2d 1193, 1197 (Mass. 1981); *State v. Buchanan*, 432 S.W.2d 342, 344 (Mo. 1968); *Barnatto v. State of Nevada*, 501 P.2d 643, 647 (1972); *State of New Hampshire v. Hanson*, 313 A.2d 730, 732 (1973); *Commonwealth of Pennsylvania v. Eshelman*, 383 A.2d 838, 841 and n.8 (1978); *Gonzalez v. State of Texas*, 588 S.W.2d 355, 360 (1979).

A particularly compelling discussion of why there is a societal expectation that the curtilage is to be treated in the same manner as the inside of a home for Fourth Amendment purposes is found in *Dow Chemical Co. v. United States* (6th Cir. 1984) 749 F.2d 307; *cert. granted* June 10, 1985, No. 84-1259. In discussing why the curtilage concept could not be easily transferred from the home to a 2,000-acre complex the court stated:

The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that *many of the private experiences of home life often occur outside the house*. Personal interactions, daily routines and intimate relationships revolve around the entire home place. There are compelling reasons, then, for applying Fourth Amendment protection to the entire dwelling area. (749 F.2d at 314, emphasis supplied.)

After noting the "peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home," the Sixth Circuit emphasized that it is "fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways." (749 F.2d at 314.) The inclusion of the curtilage in this concept of privacy is said to be "traditional" by the Sixth Circuit:

In the home setting, Fourth Amendment protection applies to adjoining areas because of the unique privacy interests associated with dwelling places, and because of our traditional understanding that home

life is not confined to the physical structure of the house. (749 F.2d at 324.)

Historically, and very soon after *Hester v. United States*, *supra*, the Sixth Circuit had decided that the "open fields" doctrine did not apply to the curtilage of a home in *Dulek v. United States* (6th Cir. 1926) 16 F.2d 275. As noted in *Oliver*, *supra*, 80 L.Ed.2d at 225, the common law protected the curtilage. *See also*, 4 Blackstone, Commentaries *225; La Fave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 2.3(d) (1978).

Although there are isolated exceptions such as *Randall v. State of Florida*, 458 S.2d 822, 825 (D.C. Fla. 1984), the cases cited in petitioner's opening brief as well as others which might be cited for a lowered expectation of privacy within the curtilage, do not apply to this case. In *United States v. Lace*, 669 F.2d 46, 49-51 (2nd Cir. 1982) the area involved between the house and the barn was visible from a public road as well as by persons approaching the front door of the home. In *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973) no dwelling house was involved but rather a barn or warehouse. In *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980) the barn and truck tracks leading to the barn on a 200-acre ranch were involved; there is no mention of curtilage or observation of a dwelling house; in *United States v. Roberts*, 747 F.2d 537, 542-543 (9th Cir. 1984) the area viewed was a road not within the curtilage; in *United States v. Hensel*, 699 F.2d 18, 41 (1st Cir. 1983) the reviewing court declined to reach the merits of the Fourth Amendment claim because it was not properly presented in the court below. *Fulbright v. United States*, 392 F.2d 432, 433-436 (10th Cir. 1968) involves agents using binoculars from an open field to view criminal activity within the curtilage. The court required a physical intrusion before finding a violation of the Fourth

Amendment, a concept incompatible with *Katz v. United States* (1967) 389 U.S. 347, discussed *infra*. *United States v. Bassford*, 601 F.Supp. 1324 (D. Maine 1985) refuses to distinguish between curtilage and noncurtilage with regard to aerial surveillance even though it recognizes that such a distinction is proper when a physical intrusion into the curtilage is involved. The record is silent as to whether any of the marijuana plants discovered in the *Bassford* case were enclosed by fences, but this does not appear to have been significant in the District Court's decision. To the extent that *Bassford* is inconsistent with the court below in *Ciraolo*, respondent would argue that *Bassford* is in error in failing to require a warrant for aerial surveillance.

II

AERIAL SURVEILLANCE OF THE PRIVATE AREAS OF THE CURTILAGE QUALIFIES AS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

The facts of our case show that suspicion focused on respondent because of the high fence around his backyard. The aerial search was undertaken for the purpose of bypassing the fence and collecting evidence of criminal activity by means of a technological presence not normally anticipated in one's backyard, a focused aerial view. Petitioner argues that because casual passers-by in the air might have obtained the same view, respondent's backyard was in open view, like the outpourings of the smokestacks in *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), and that therefore the viewing by Officer Shutz and his companions was not a "search" within the prohibitions of the Fourth Amendment. Even

as to the intimate areas of the home¹⁰ petitioner would require an opaque covering depriving residents of free access to light and air if they wish to preserve their privacy.

Respondent argues that the technical avoidance of a physical intrusion does not negate a search within the meaning of the Fourth Amendment. The exposure of his backyard to a viewing by an occasional nondirected casual overflight is not a waiver of privacy rights. It is not reasonable to expect our society to surrender access to light and air in order to avoid waiver of constitutionally protected privacy rights.

A. The Avoidance Of A Physical Intrusion By The Use Of An Airplane Does Not Negate A Fourth Amendment "Search."

The thrust of *Katz v. United States* (1967) 389 U.S. 347 is more than the "expectation of privacy" concept contained in Justice Harlan's concurring opinion and now frequently relied upon in opinions for the Court. It is that a physical intrusion into a protected area is not a *sine qua non* of a Fourth Amendment "search." *Katz* made a major change in the early concept of *Olmstead v. United States* (1928) 277 U.S. 438 where a tap of telephone wires outside of the curtilage was held not a "search" under the Fourth Amendment. This older "constitutionally protected area" concept was stretched thin in *Silverman v. United States*

¹⁰ In addition to the curtilage as part of the home, the interpretation of the Fourth Amendment argued for by petitioner in this case would deprive of all protection against aerial spying interior patios completely surrounded by the home in the Spanish style, as well as those areas of the home which could be seen through translucent skylights.

(1961) 365 U.S. 505 where a slight penetration into a protected area by a spike mike called forth the protections of the Fourth Amendment. It was finally broken in *Katz* where there was no physical penetration but an obvious interference with privacy concepts deeply valued in our society.

The *Katz* Court retooled the parameters of constitutionally protected privacy to meet the challenge of new technology. Whether or not a "constitutionally protected area" was involved was no longer the solution to preserving the security the Framers protected by the Fourth Amendment. A new dimension was added: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (*Katz*, 389 U.S. at 351-352, emphasis supplied.) The reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz* at 353. Applying these rules to its facts, *Katz* held that eavesdropping with a listening device transmitting a conversation from a telephone booth without any physical trespass of the booth was a "search" and unconstitutional because the government did not obtain a search warrant for the intrusion, nor were any of the exceptions to the warrant requirement applicable.

As Professor La Fave has noted in his extensive discussion of the *Katz* case,¹¹ sweeping away the "constitutionally protected area" test made the definition of

¹¹ La Fave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 2.1.

"search" both broader and more difficult.¹² In place of

¹² As to the exact criteria to determine that monitoring the conversation within the telephone booth was a "search" within the meaning of the Fourth Amendment, the *Katz* Court left that to be resolved in future cases, as is natural in the common law tradition. The Court used its own perceptions of societal values to conclude:

One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. (389 U.S. at 352).

Justice Harlan in his well-known concurrence in *Katz* wrote that society must be prepared to recognize a claim of privacy as "reasonable." (389 U.S. at 361). In a later dissenting opinion in *United States v. White*, 401 U.S. 745 at 786 (1971), Justice Harlan advanced as the criterion to be applied in such cases the impact of the challenged practice on the "sense of security which is the paramount concern of Fourth Amendment liberties." Respondent believes that this is a most appropriate concern and discusses his case in these terms later in this brief.

Other commentators have used generalized criteria which we repeat here in the event they may be of value to this Court:

[A court must take into account] both contemporary norms of social conduct and the imperatives of a viable democratic society. [*United States v. Vilhotti*, 323 F.Supp. 425 (S.D.N.Y. 1971)].

The criteria for reasonable expectations must be extracted from the flow of life, and it is the judge's task to find and articulate those societal standards. (Note, 6 University of Michigan J.L. Ref. 153, 179-180 (1972).)

[The ultimate question is] whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the Fourth Amendment inexorably requires the court to make. Amsterdam, *Prospectives On The Fourth Amendment*, 58 Minn.L. Rev. 349, 403 (1974).

The *Oliver* case itself put forth a number of factors to be considered as to whether a claim to Fourth Amendment privacy is legitimate. These are (1) the intention of the Framers of the Fourth Amendment,

common law property principles, the crucial questions now require an analysis of societal considerations and values in deciding which privacy expectations are to be protected under the Fourth Amendment and under what circumstances. We have shown in the previous section of this brief that our social values and considerations give a very high priority to the need for privacy in the secluded outdoor areas of our homes. The telephone booth was a transitory and vulnerable shelter for Katz; the Ciraolo backyard is a permanent area of repose and sanctuary even more deserving of the protection of the Warrant Clause of the Fourth Amendment.

As we show below, the mere fact that there is a need to traverse most of the airspace in our busy world at some time or another does not remove a private curtilage from its constitutional protection. Mr. Katz was not deprived of the intimacy of his telephone booth merely because an observer could see him through the glass doors, or because someone in the next booth could have overheard his conversation, or because the person on the other end of the line might have granted permission for the govern-

(2) the uses to which the individual has put a location, and (3) our societal understanding that certain areas deserve the most scrupulous protection. (466 U.S. at ____, 80 L.Ed.2d at 223-224.)

Finally, Justice Powell with whom the Chief Justice concurred in *Rakas v. Illinois*, 439 U.S. 128, 152-153 stated four criteria for application of the *Katz* test, (1) whether the claimant to Fourth Amendment privacy took normal precautions to maintain his privacy; (2) the uses to which a location is put; (3) an historical view to ascertain the intentions of the Framers of the Fourth Amendment; and (4) what traditional property rights could be claimed. Justice White, joined in by Justices Brennan, Marshall and Stevens, dissenting in *Rakas*, *supra*, stated a more general test of asking this Court to consider what privacy rights are "essential to securing 'conditions favorable to the pursuit of happiness.' "

ment to listen to the conversation. (*United States v. White* (1971) 401 U.S. 745.)¹³ The fact that his privacy was not absolute did not eliminate it.

Although the only warrantless intrusion made by the agents of the State into respondent's backyard was visual, *Katz* teaches that the deliberate diminution of privacy it represents is intolerable in a free society.

B. The Limited Scope Of The Surveillance Did Not Prevent It From Being A Search.

Petitioner argues (Brief, pp. 46-47) that the police used "no sophisticated technology" to expose "intimate secrets of Ciraolo's life. . . ." nor did the police fly low or enhance their views with binoculars or telescopes. In short, their activities, according to petitioner, were "reasonable." (*Ibid.*) There are several answers to these arguments. First, this Court has recently made it very clear in *United States v. Karo*, 468 U.S. ____, 82 L.Ed.2d 530, 104 Sup.Ct. 3296 (1984) that the extent of the governmental trespass into an area protected by the Fourth Amendment is not a significant factor in the application of the exclusionary rule once a constitutional violation is found. Second, petitioner fails to take into account the concern expressed by this Court and by thoughtful commentators about the chilling effect on freedom caused by unrestricted government surveillance of the intimate areas of our lives. Third, nothing in petitioner's chief argument—that there was no search because backyard areas already potentially visible from the air are not protected by the

¹³ This Court does not decide Fourth Amendment cases on hypothetical possibilities that privacy could have been lost. See *United States v. Karo*, 468 U.S. ____, n.4, 82 L.ed.2d 530, 542, n.4 (1984).

Fourth Amendment—would place *any* limits on the technological devices available to the police to inspect, photograph, and spy on the backyards of America.¹⁴ When it comes to invasions of the home, the Warrant Clause of the Fourth Amendment (omitted by petitioner in the statement of the Constitutional Provision Involved, Brief, p. 3) requires that a neutral magistrate rather than the police make the decision as to invasions of privacy in the absence of emergency.

1. This Search Was More Intrusive Than The One Held Unconstitutional In *United States v. Karo*.

In *United States v. Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 Sup.Ct. 3296 (1984) a court order allowed the installation and monitoring of a beeper in a container of chemicals suspected as a potential ingredient for illicit drugs. Monitoring the beeper, drug agents determined that its container was inside a particular house and obtained a search warrant partially based upon that information. However, the government conceded that the warrant allowing the installation and monitoring of the beeper was defective and attempted to persuade the Court that warrantless monitoring of the beeper device within a home was consistent with the Fourth Amendment. The Court held that any uninvited penetration of the home was an unreasonable search absent warrant or emergency. Even though the only thing which the government learned from the beeper was that the marked chemicals were present in a particular residence, the case was treated as if a DEA agent had thought it useful to enter the residence surreptitiously to verify the beeper's pres-

¹⁴ The FAA standard of 1,000 feet is a safety rule; it is not promulgated or enforced for privacy reasons. *State v. Davis*, 51 Or.App. 827, 627 P.2d 492, 494 (1981).

ence and had done so without a warrant. The search was condemned as "indiscriminate monitoring of property that has been withdrawn from public view. . . ." (468 U.S. at ___, 82 L.Ed.2d at 542.)

Neither the difficulties associated with procurement of a warrant nor the fact that the intrusion was only "miniscule" deflected this Court's application of the warrant requirement. *See also, Hayes v. Florida*, ___ U.S. ___, (March 20, 1985, 53 L.W. 4382) where the Court refused to countenance a warrantless entry into a person's home even for the limited purpose of obtaining fingerprint identification and even where such entry was supported by probable cause. Thus "limited," "miniscule," and brief violations of Fourth Amendment protections of the home have always been condemned by this Court without exception.¹⁵

2. The Chilling Effect Of Aerial Surveillance Of Backyards Is Incompatible With The Fourth Amendment

The protections of the Fourth Amendment do more than deter the police from particular types of searches. Perhaps what is at stake has best been stated by Justice Frankfurter dissenting in *Harris v. United States*, 331 U.S. 145, 173:

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be

¹⁵ Petitioner concedes (Brief, p.13) that an officer who jumped respondent's fence or placed a ladder against it and viewed the marijuana plants would violate reasonable expectations of privacy. As in *Karo*, the technical means of violating privacy expectations would seem to be irrelevant; no less can be seen from the air than by a peek over the fence. We might ask Petitioner to explain its position concerning use of a periscope or hook and ladder firetruck.

said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole.

This Court recently quoted with approval what Justice Brandeis said in dissent in *Olmstead v. United States*, 227 U.S. 438, 478 (1928), that the Fourth Amendment protects "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." The quotation came in *Winston v. Lee*, 53 L.W. 4367, 4368 (1985), a case involving physical intrusion into the body to retrieve an expended bullet. Although the intrusion in our case is less immediate, in the long run it would be more damaging to the whole fabric of our society to lose the repose and security we now have in the protected areas of our homes to an ever-present, unseen but surveilling, government.

A limited number of cases have already faced the problem of the technological invasion of the home or person without warrant or physical intrusion. Of course, this Court did so in *Katz v. United States*, *supra*. See also *United States v. Karo*, *supra*, 82 L.Ed.2d at 539, where the Court mentioned a parabolic microphone capable of picking up conversations from within nearby homes, saying:

It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence. [82 L.Ed.2d at 539-540]

In an early case, *United States v. Lee* (1927) 274 U.S. 559, the Court held that there was no Fourth Amendment violation by examining the open deck of a boat by a searchlight before boarding. Of course, this and other visual aids to bring objects already in open view to the

attention of the observer in greater detail cannot be compared to the deliberate invasion of a private area by a technological device.

The latter situation was faced by *United States v. Kim*, 415 F.Supp. 1252 (D. Hawaii 1976) where the police used a telescope to view the interior of an apartment through areas open to the light. They were able to see what the defendant was reading within his apartment. Although the government agents had the right to be where they were while they were making the surveillance, the intrusion was still held a "search" forbidden by the Fourth Amendment without warrant. In response to the government's argument that people in nearby apartments might have used telescopes to spy on Kim, the court responded that intrusion by the government is on an entirely different footing:

The fact that Peeping Toms abound does not license the government to follow suit. In the particular context of this case, lack of concern about intrusions from private sources has little to do with an expectation of freedom from systematic governmental surveillance. [415 F.Supp. at 1256.]

If, instead of binoculars and a telescope from a distance, the police had used an airplane or helicopter to peer into Kim's open windows in his high-rise apartment, would the result have been any different? See also, on binocular invasions *United States v. Taborda*, 635 F.2d 131 (2nd Cir. 1980); *State of Hawaii v. Knight*, 621 P.2d 370 (1980); *State of Oregon v. Blacker*, 630 P.2d 413 (1981) and LaFave, *Search and Seizure, A Treatise On The Fourth Amendment*, §§ 2.2(c) and (d) and 2.3(c).

In these days of explosive technological advances (about which information is often muted by the need for security in our uneasy world), it is a commonplace that

airborne or satellite-borne surveillance equipment could perform remarkable tasks comparable to or exceeding the ability of the government agents in *Kim* to read what the defendant was reading from one-quarter mile (that is, 1,320 feet) away. See Grange, *Visual Remote Sensing In Privacy Interests Of The Fourth Amendment*, 1 Northrup Univ. L.J. 33 (1980); Thornton, *Police Use of Sense-Enhancing Devices And The Limits Of The Fourth Amendment*, 1977 Law Forum 1167 (1977). The presence of a threat of such unknown invasions of our privacy without probable cause may be the difference between a free society and a totalitarian society. The value of privacy is its promotion of the goals of a free nation: liberty, autonomy, selfhood, spontaneity and open human relationship, and a free, open and democratic society. See Gavison, *Privacy And The Limits Of Law*, 89 Yale L.J. 421, 423 and n.11 (1980) Encouragement of the government to invade a private yard to overhear a private conversation or to see private activities, all within the home, by allowing technological devices an exemption from the Fourth Amendment, would be a severe blow to the values of our society.

3. Only The Warrant Clause Provides Appropriate Limits For Technological Surveillance Of Private Areas Without Physical Intrusion

In this case, petitioner seemingly wishes to limit the application of the Fourth Amendment's Warrant Clause to areas protected by four walls and an impermeable roof unless there is an actual physical intrusion by a government agent.¹⁶ Respondent believes that the Warrant

¹⁶ Petitioner would protect the backyard under the Fourth Amendment's Warrant Clause if the police jumped a fence or placed a ladder against it to peer into the yard. Petitioner's Brief, p. 13. Petitioner would also protect curtilage "associations, objects or activities" which would be imperceptible from the air. Petitioner's Brief, pp. 14-15. Petitioner does not indicate under what standards or criteria these protections would be applied.

Clause is applicable to this case and requires the judgment of a neutral magistrate before there is an intentional breach of the security of a curtilage in an attempt to gather evidence against a particular person.

In *United States v. Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 Sup.Ct. ___ (1984), this Court once again reviewed the preference for the use of warrants when such use is practicable. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." (*Karo, supra*, 82 L.Ed.2d at 542-543.) The Court further commented:

Requiring a warrant will have the salutary effect of insuring that use of beepers is not abused, by imposing upon the agents the requirement that they demonstrate in advance their justification for the desired search.

* * *

The argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement.

* * *

We are also unpersuaded by the argument that a warrant should not be required because of the difficulty in satisfying the particularity requirement of the Fourth Amendment.

* * *

In sum, we discern no reason from deviating from the general rule that a search of a house should be conducted pursuant to a warrant. [*Karo, supra*, 82 L.Ed.2d at 543-544.]

See also, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Aerial surveillance without warrant raises another problem, that of imperceptible invasion of privacy.¹⁷ Unless it succeeds in initiating a legal proceeding, the aerial surveillance may never come to light. Views of private backyards, whether visual or photographic, will be circulating in the police community without any responsibility to make them of record. This contributes to the building up of a dossier on individuals, the effects of which have been reviewed by this Court in *LaMont v. Postmaster General*, 381 U.S. 301 (1965). On the other hand, search warrant affidavits and the warrant itself are official records filed with a court so that government activities are not above review. Without such review, the aerial surveillance becomes a warrantless general warrant, a license to go anywhere, to search for anything, and only to report on it when a culprit is taken in hand.

Given the agreement by petitioner that respondent's fence could not be breached by a police officer jumping over it or peering over it from a ladder, it is apparent that the real police purpose in chartering an airplane to view respondent's backyard was to "jump" the fence and take advantage of the fact that there is no effective way to screen a backyard from aerial invasion except by depriv-

¹⁷ "Even an invasion of privacy which is never revealed to the victim may do him considerable harm. Others may profit from what he thought was concealed, or they may act unfavorably, and, perhaps, unfairly toward him for reasons he never knows. See, e.g., P. Kimball, *The File* (1983). Moreover, the fear that government agents are electronically listening or watching without prior judicial approval diminishes the sense of security to which the Fourth Amendment entitles "the people" collectively. Thus, it makes sense to apply the *per se* liability of the warrant requirement as a deterrent in the subgroup of cases where the invasion is not usually detectible." Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 301-302, n.220 (1984).

ing it of the qualities which make it a backyard. Thus the police action in this case is a deliberate attempt to evade the requirement of the Warrant Clause that the facts justifying a government invasion of privacy, absent an emergency or consent, be presented to a neutral magistrate. To some extent there is a balance to be considered: if a person's curtilage is already open to public view no warrant is required; but if a person has made clear his desire to secure his privacy, that should be sufficient to trigger the Warrant Clause requirement for the extraordinary measure of a focused and deliberate aerial breach of this privacy. Such a rule would not inhibit the police in the general use of airspace; only when the purpose of the police is to use the airspace in a deliberate attempt to breach the privacy of a resident upon whom their suspicion has focused would a warrant be required. The time-honored interposition of a detached magistrate is the appropriate method of keeping technological surveillance under control.

Aerial surveillance by the government in an attempt to substantiate suspicion of criminal activity does not involve just a single pass of an aircraft and casual glances over hundreds of square miles of territory. When focused, as in our case, it can be easily abused. See *People v. Sneed*, 32 Cal.App.3d 535 (1973; many passes by a helicopter sometimes as low as 25 feet); *Dean v. Superior Court*, 35 Cal.App.3d 112, 117 (1973; "one who builds a swimming pool and sun-bathing area in his backyard expects privacy (hence immunity) from aerial inspection. Areas reasonably used in ordinary business operations are assumedly entitled to similar immunity. Such areas are expectedly private according to the common habits of mankind." [Dictum.]); *Nat. Org. for Reform of Marijuana Laws v. Mullen*, 608 F.Supp. 945 (D.C. Cal. 1985; helicopter sur-

veillance of homes and curtilage involving low-flying and hovering helicopters engaged in marijuana eradication enjoined); *United States v. Broadhurst*, ____ F.Supp. ____ (E.D. Cal. June 21, 1985; repeated and circling airplane surveillance of a greenhouse violated reasonable expectations of privacy.) Surely it is preferable that the Warrant Clause of the Fourth Amendment draw the line in this area rather than it be drawn by an ad hoc determination of how many airplane passes were made over which property at what height and for what purpose.

Similarly, a neutral magistrate could best devise appropriate procedures to protect the backyards of persons not even suspected of crime from intrusion by visual or photographic surveillance. Now, as shown by Exhibit A to the search warrant (J.A. 48-49) there are no such protections.

C. Where The Reason For A Warrantless Search Is to Evade The Warrant Requirement, The Search is Invalid.

A criminal search with a search warrant is required if the primary object of a non-emergency residential search is to gather evidence of criminal activity. *Michigan v. Clifford*, ____ U.S. ____, 52 L.W. 4056 at 4058 (1984). That case shows that the purpose of the search affects its legality.¹⁸ The constitutionality of a search must be examined in terms of several factors, given the particularly strong privacy expectations in private residence. *Id.* at 4059 and n.7 and cases there cited.

¹⁸ "The constitutionality of warrantless and nonconsensual entries into fire-damaged premises, therefore, normally turns on several factors: * * * whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity." *Clifford*, 52 L.W. at 4058.

If there are legitimate privacy interests in certain areas of a home and no exigent circumstances, and the government's purpose is to determine the nature of an incident or to gather evidence of criminal activity, police investigation will be held unconstitutional absent a warrant or, at the least and under Justice Stevens' concurring view, advance notice to the owner. Furthermore, where there is no immediate need to undertake an extensive exploration of private residential premises, a warrantless continuation of an initial investigation based on exigent circumstances may even be held unjustified.

In *Clifford*, an early-morning fire destroyed the downstairs portion of a private residence. Responding fire units extinguished the blaze and left the premises after an hour and a half. Five hours later, an arson investigator conducted a warrantless and nonconsensual search at the fire-damaged home, discovering evidence that led to the arson conviction of the homeowners. This Court held that although a burning building creates an emergency justifying a warrantless entry by fire fighters, where reasonable privacy expectations remain in the fire-damaged property after the fire has been extinguished, and a reasonable investigatory time has passed, additional nonconsensual investigation must be pursuant to a warrant or some new emergency. 52 L.W. at 4058.

The search of the Clifford home was viewed by this Court as two-fold, each investigation being examined separately for its constitutionality. The first entry was permissible for the purpose of fighting the fire. The second entry was not, despite the uninhabitable condition of the damaged home. This is because personal belongings remained on the property, and the Cliffords had made every reasonable effort to secure the privacy interests in their home against further intrusion.

The investigation in our case may be examined by a similar two-fold approach. The first segment was permissible as it was conducted from an anticipated and public vantage point. The second, however, made with the express purpose of circumventing Ciraolo's reasonable efforts to exclude the uninvited public, was impermissible for the failure to obtain a warrant and for lack of exigent circumstances.

Shutz's initial ground-level investigation of Ciraolo's home, made without specific information, consent or exigent circumstances, was undertaken to discover evidence of criminal activity. However, it was conducted from publicly-used access areas of streets and sidewalks. At that time, Shutz's purpose in his investigation did not involve a deliberate intrusion into Ciraolo's private spaces.

Stage two of Shutz's investigation cannot be justified by any exception to the warrant requirement for a search of the interior spaces of a private residence, those areas where privacy expectations are exceedingly strong. The aerial search of the inner portions of respondent's house "could only have been a search to gather evidence of the crime. . . ." This is an improper purpose. *Clifford, supra*, 52 L.W. at 4059. A warrantless intrusion into the curtilage "for the purpose of conducting a search for criminal activity" is unconstitutional. *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978) and cases there cited. See also, *United States v. Hersh*, 464 F.2d 228, 230 (9th Cir. 1972); *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964); *People v. Superior Court (Spielman)* (1980) 102 Cal.App.3d 342, 162 Cal.Rptr. 295 (inadvertent invasion of curtilage while present for another purpose not a Fourth Amendment violation).

It has long been accepted that the purpose for which a search is made is the key to its legality. A private area can be entered by the government if an emergency does not allow a warrant to be obtained, or even if the police reasonably believe that such an emergency exists. However, the deliberate breach of a reasonable expectation of privacy in an enclosed backyard is an improper purpose.

III

RESPONDENT DID NOT WAIVE HIS FOURTH AMENDMENT RIGHTS BY FAILING TO ENCLOSE HIS BACKYARD

Possibly the most initially attractive argument made by the petitioner is that the police were only doing what any air traveler might do, pass over respondent's backyard through the air. As we have already noted, respondent believes that the police purpose to invade already-declared privacy in a focused manner makes this case quite different from an accidental police observation, or from one obtained in the course of a generalized air patrol. We discuss additional factors concerning petitioner's consent argument at this point.

It must be conceded that respondent did everything which could be required to preserve his privacy unless he is also required to surrender access to air and light. Respondent's home was not adjacent to a government base with the knowledge that government planes inspected his lands as a routine matter in the course of their other duties. (See *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980). There is no evidence of any routine air traffic over respondent's backyard.

The possibility of a glance from a passing aircraft is a slender reed upon which to rest the waiver of a constitu-

tional right to privacy. Of the aircraft which may pass over respondent's backyard,¹⁹ very few are traveling at less than one-quarter mile above the surface. Even fewer are intensely looking at his backyard; even fewer contain government agents seeking evidence of crime. To equate an "open view" with the facts of this case is not only to ignore all of the above factors but to ignore the fact that the airplane making the view in this case contained the "practiced eye" of an expert in marijuana detection from the air who would see what the casual, or even intensely curious, viewer from the air would not see.

Respondent does not challenge the right of the government to use the airspace over his house or any other house. What he does challenge is the assumption that there is no reasonable societal expectation of privacy as to anything which might be seen from the air under any circumstances. We think that there is a reasonable societal expectation to privacy from police surveillance from the air when such surveillance is focused, intended to breach privacy and accomplished by the sharp eye of a trained observer. *Katz v. United States, supra*, declines Fourth Amendment protection for "what a person knowingly exposes to the public. . . ." (389 U.S. at 351-352.) There was no knowing exposure to the public under the circumstances of this case.

IV

THE ADMINISTRATIVE WARRANT SOLUTION

In discrete areas where the government's inspection needs are obvious, this Court has authorized administrative warrants issued on less than probable cause but

¹⁹ There is nothing in the record concerning any air traffic over respondent's home.

still guaranteeing to the people of our nation the protections of the Fourth Amendment against government intrusions into homes, businesses and telephone lines. See *Camera v. Municipal Court*, 387 U.S. 523 (1967) and the many cases applying its teachings. See also, *Michigan v. Clifford, supra*. The use of administrative warrants in surveillance situations has been discussed in *United States v. Kim, supra*, 415 F.Supp. at 1257 and *United States v. Broadhurst, supra*, ____ F.Supp. ____, _____. Further discussion is not needed as no such warrant was applied for in this case.

V

CONCLUSION

The time to stop warrantless technological surveillance is now, before it gets out of hand and before it changes the nature of our society. The airplane involved in our case does not lift the police above the law or the constitution. Respondent's privacy could not be breached without the authorization of a warrant or a proper exception to the warrant rule.

Respectfully submitted,
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No. 84-1513

Supreme Court, U.S.

FILED

NOV 27 1985

JOSEPH E. SPANIOLO,
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAULO,

Respondent.

REPLY BRIEF FOR PETITIONER

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TOPICAL INDEX

ARGUMENT

PAGE

- I. LEGITIMATE PRIVACY EXPECTATIONS ARE NOT VIOLATED BY POLICE OBSERVING A FENCED RESIDENTIAL YARD EXPOSED TO VIEW FROM NAVIGABLE AIRSPACE WHICH IS A PUBLIC AREA SUBJECT TO ROUTINE PATROL. 1
- A. Ciruolo's Approach Which Requires Police to Avert Their Eyes From Fenced Residential Yards During An Aerial Observation Undertaken To Investigate Suspected Criminal Activity Is Unworkable. 4
 1. The Protections Afforded The Home's Security Under The Fourth Amendment Do Not Prohibit Police From Observing "Curtilage" From A Point Of Public Access Where Routine Police Presence Is Accepted As Reasonable By Society. 4
 2. Ciruolo's Focus And Purposeful Evasion Tests Do Not Provide Practical Guidance To Police. 13
 3. The Fact That Police Observe A Residential Yard By Using An Aircraft Does Not Give Rise To Fourth Amendment Violation. 26

TOPICAL INDEX
(continued)

ARGUMENT	<u>PAGE</u>
II. CIRAULO'S ADMINISTRATIVE WARRANT PROPOSAL DOES NOT HARMONIZE WITH FOURTH AMENDMENT PRINCIPLES AND PROVIDES NO GUIDANCE TO MAGISTRATES IN DISCHARGING THEIR WARRANT-ISSUING FUNCTIONS.	31
III. THE COURT OF APPEAL ERRED UNDER THE FOURTH AMENDMENT.	40
CONCLUSION	42

TABLE OF AUTHORITIES

	<u>PAGE</u>
Camara v. Municipal Court 387 U.S. 523 (1967)	36
Donovan v. Lone Steer, Inc. ____ U.S. ___, 78 L.Ed.2d 567 104 S.Ct. 769 (1984)	37
Hester v. United States 265 U.S. 57 (1924)	6
Katz v. United States 389 U.S. 347 (1967)	4
Michigan v. Clifford 464 U.S. ___, 78 L.Ed.2d 477 104 S.Ct. 641 (1984)	31
Nat. Org. for the Reform of Marijuana Laws v. Mullen 608 F.Supp. 945 (N.D. Cal. 1983) (appeal pending No. 85-1883, 9th Cir.)	12
Oliver v. United States 466 U.S. ___, 80 L.Ed.2d 214 104 S.Ct. 1735 (1984)	6
People v. Sneed 32 Cal.App.3d 535 108 Cal.Rptr. 146 (1973)	12
United States v. Jacobsen 466 U.S. ___, 80 L.Ed.2d 85 104 S.Ct. 1652 (1984)	7
United States v. Karo 468 U.S. ___, 82 L.Ed.2d 530 104 S.Ct. 3296 (1984)	6
United States v. Knotts 460 U.S. 276 (1983)	6

TABLE OF AUTHORITIES (CONTINUED)

	<u>PAGE</u>
United States v. Leon 468 U.S. ___, 82 L.Ed.2d 667 104 S.Ct. 3405	20
United States v. Santana 427 U.S. 38 (1976)	6
Washington v. Chrisman 455 U.S. 1 (1982)	19
California Civil Code § 841.4	24
4, Blackstone Commentaries on the Laws of England 225 (Univ. of Chicago Press 1979)	5

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I

LEGITIMATE PRIVACY EXPECTATIONS ARE NOT VIOLATED BY POLICE OBSERVING A FENCED RESIDENTIAL YARD EXPOSED TO VIEW FROM NAVIGABLE AIRSPACE WHICH IS A PUBLIC AREA SUBJECT TO ROUTINE PATROL

Respondent Ciraoilo contends that his yard was curtilage entitled to protection from warrantless searches

to the same extent as the home itself. (Resp. Br. 5-12.) Ciraolo argues that the aerial observation was a search because it was undertaken to bypass his fence and to collect evidence of criminal activity by means of an unanticipated "technological presence" focused at his yard. (Resp. Br. 12-29.) According to Ciraolo, he did not "waive" his Fourth Amendment rights by failing to protect his yard from aerial observation. (Resp. Br. 29-30.) Ciraolo also suggests that an administrative warrant requirement may be an acceptable accommodation of privacy expectations and the governmental need to investigate. (Resp. Br. 30-31.)

This Court should reject those contentions. The fact that Ciraolo's marijuana was grown inside a fenced backyard to which police did not have physical access does not create a legitimate expectation against police observation from a public place,

navigable airspace, indisputably an area which they may patrol on a routine basis and, hence, a place where they have a right to be. No decision of this Court reflects that police lose the right to be in a public place because they are engaged in criminal investigation and believe evidence of such activity may be exposed to view from that place. It is sophistical to say that technology which permits police to enter navigable airspace - an airplane - is unanticipated in a criminal investigation when the use of that very technology is undeniably expected and accepted for routine police patrol during which identical incidents of visual observation as occurred in this case can lawfully take place.

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A. Ciraolo's Approach Which Requires Police To Avert Their Eyes From Fenced Residential Yards During An Aerial Observation Undertaken To Investigate Suspected Criminal Activity Is Unworkable.

1. The Protections Afforded The Home's Security Under The Fourth Amendment Do Not Prohibit Police From Observing "Curtilage" From A Point Of Public Access Where Routine Police Presence Is Accepted As Reasonable By Society.

The question whether the aerial observation in this case constituted a warrantless search is not answered by Ciraolo's argument that the curtilage is entitled to the same protections from searches given the home itself. To quote Ciraolo, after Katz v. United States, 389 U.S. 347 (1967), "[w]hether or not a 'constitutionally protected area' was involved was no longer the solution to preserving the security the framers protected by the Fourth Amendment." (Resp. Br. 14.) It does not rationally follow from the fact that Katz justifiably expected by enclosing himself

in a telephone booth that his conversation would "not be broadcast to the world", 389 U.S. at 352, that enclosing a marijuana garden inside a residential fence entitles one to think that the label of "curtilage" protects that garden from being seen by the world.

Indeed, nothing in Ciraolo's brief suggests that the curtilage doctrine demarcates a point at which blanket expectations against observation from public areas outside its perimeter exists. Ciraolo appears to recognize (Resp. Br. 11), that the curtilage doctrine originally defined those areas of the home encompassed within the common law offense of burglary (4, Blackstone, Commentaries on the Laws of England, 225 (Univ. of Chicago Press 1979).) Its historical basis in concepts of wrongful trespass into the security of the home has been carried

into the Fourth Amendment context as a limitation on warrantless physical entries, see, Oliver v. United States, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984), and not as a protection against police detection of things outside the home which were seen from points open to the general public and police alike. See United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 541-542; 104 S.Ct. 3296, 3303-3304 (1984); United States v. Knotts, 460 U.S. 276, 281-285 (1983); e.g., United States v. Santana, 427 U.S. 38, 42 (1976); Hester v. United States, 265 U.S. 57, 59 (1924).

The Fourth Amendment concerns itself with government activity invading "[t]he right of the people to be secure in their . . . houses." That guarantee is alien to protections sought to vindicate an individual's subjective estimation of the likelihood of discovery

by police. United States v. Jacobsen, 466 U.S. ___, 80 L.Ed.2d 85, 100; 104 S.Ct. 1652, 1661 (1984). Moreover, the protections afforded by that guarantee are not shaped according to hypothetical possibilities that the public might (or might not) discover something and report it. See United States v. Karo, 468 U.S. at ___, 82 L.Ed.2d at 542, n. 4, 104 S.Ct. at 3304, n. 4 (1984).

Hence, Ciraolo's appraisal of the possibility of a "glance from a passing aircraft" at his yard, the intensity with which the airborne public might look, and the respective qualities of the untrained airborne observer's vision as against the "practiced eye" of the policeman's gaze (Resp. Br. 29-30), no more indicates illegality in police viewing his yard from navigable airspace with the naked eye than his asserted expectation against having his yard so viewed. The very fact that Ciraolo's

expectations rest upon such individualized appraisals, not discoverable by airborne officers in advance of viewing a yard, demonstrates their impracticality as a guide for police.

In any event, the protection of the home afforded the curtilage from warrantless searches does not translate, as Ciruolo implies, into protection against governmental observation of curtilage that might violate the Fourth Amendment if directed into the interior of the home. Police walk up paths, sidewalks or driveways to contact residents during criminal investigations without warrants, consent or exigent circumstances. Naturally they see curtilage when they do. But police may not enter the home itself without authorization.

Even the "private" e.g., fenced, areas of curtilage are not

subject to the same degree of visual protection as afforded the home. Ciruolo joins the Court of Appeal in distinguishing this case from those where police "focus" on fenced residential yards during "generalized air patrol". (Resp. Br. 29.) But warrantless "patrol" of the home's interior could never be permitted. Ciruolo must, therefore, concede that material differences do exist between the protections afforded from visual observation of (and, hence, the visual privacy legitimately expected in) the curtilage as opposed to the home itself with respect to aerial observation.

If those protections are the same, Ciruolo's distinction between fenced and unfenced curtilage makes no sense. The privacy expected inside the home would subsist in the curtilage regardless of one's ability to enclose a yard from ground view. Yet, Ciruolo

rejects this result (Resp. Br. 25) just as we do.

Ciraolo flounders on the horns of a dilemma produced by the California court's tortured logic: either the protections inside the home from aerial observation are qualitatively different than those afforded in the curtilage or they are not and, if it is the latter, police "search" if they look from the air even if the yard can be seen from the ground.

While Ciraolo labors to prove that the home and curtilage are identically protected from warrantless searches, he cannot avoid the paramount characteristic of aerial observation from navigable airspace of curtilage, as in this case, which is absent in cases of intrusion into the home's interior: as a practical matter, the governmental conduct in the former situation discloses to the senses of police things which are

accessible to the public and police alike in ways that things inside the home simply are not.^{1/}

Given this basic reality, and the fundamental fact that the curtilage doctrine focuses on physical invasions which defeat the security enjoyed in the home (not the mere hope that things in the curtilage might be unseen), it

1. Ciraolo appears more than a little sensitive to the force of this point. He asserts not less than three times in the course of his brief that no evidence of other aircraft flying over his yard exists (Resp. Br. 3, 29, 30, n. 19); an observation utterly irrelevant to his own analysis which would render the police conduct herein a search even if he lived at the end of a runway. In any event, while Ciraolo is free to argue that Officer Schutz's testimony that the airplane was in a flight line (J.A. 38) refers to a flight line over someone else's house, he is not free to deny the reasonable inference that it was precisely his house to which the officer addressed his remarks. Indeed, the record suggests that the trial court drew that inference. During argument on the suppression motion, the court asked rhetorically, "People live around airports, they have to expect overflights, don't they?" (J.A. 62.)

should be no surprise that cases holding aerial observation of curtilage violative of the Fourth Amendment, apart from the present one, have focused squarely on physically intrusive conduct by police. Nat. Org. for the Reform of Marijuana Laws v. Mullen, 608 F.Supp. 945, 955-958 (N.D. Cal. 1983) (appeal pending No. 85-1883, 9th Cir.) (helicopter "buzzings", "hoverings" and "dive bombings."); People v. Sneed, 32 Cal.App.3d 535, 542-543, 108 Cal.Rptr. 146, 150-151 (1973) (low altitude helicopter hovering.).

It is a legitimate investigative technique for police to observe a residential yard for suspected criminal activity from a point of public access where the presence of police on patrol is accepted by society and where identical incidents of visual observation routinely occur.

The decision of the Court of Appeal does not represent any modest judicial gloss to principles that police cannot invade homes on suspicion or terrorize hapless occupants with frightening technological inventions. Rather, it stands alone, at war with commonplace reality and the weight of authority alike, as an injunction to police to avoid looking for something intentionally from a point at which they are otherwise permitted to see the same thing routinely.

2. Ciraolo's Focus And Purposeful Evasion Tests Do Not Provide Practical Guidance To Police.

The crux of respondent Ciraolo's position, stated in his second argument, is that the police unconstitutionally "focused" on his yard from an airplane in order to bypass his fence. (Resp. Br. 12.) Under this argument, a focused view of curtilage is

a search unless the curtilage is "already open to public view". (Resp. Br. 25.) Thus, a warrant would be required "only when the purpose of the police is to the use the airspace in a deliberate attempt to breach the privacy of a resident upon whom their suspicion is focused . . ." (Resp. Br. 25.)

Ciraolo advances a highly fact specific test of what aerial observations constitute a search dependent upon (1) the curtilage being closed to ground view;^{2/} (2) use of aircraft by police to evade measures taken to conceal activity; and (3) "focus" on specific curtilage to gather evidence. These criteria do not accord significance to the extent to which physically intrusive conduct marks

2. Resort to aerial observation could not be characterized as having been undertaken to "bypass" a fence unless, in fact, a residential fence precluded observation from all ground areas outside its perimeter available to police.

an overflight, nor the degree to which specialized technology is employed in the course of overflights which disclose to the police the intimate activities of the home otherwise imperceptible to the police or the public from navigable airspace.^{3/} Moreover, they have the effect of denying protection to those countless individuals who cannot exclude all ground view of their yard.

3. To be sure, Ciraolo and defense amici attempt to imply that such concerns are involved here by a subtle factual distortion of the record meant to suggest that the aerial photograph was used to identify his plants as marijuana (Resp. Br. 2) and by characterizing the overflight as "low-flying" (ACLU Br. 13). The record shows, however, that the identification was made without visual aids (J.A. 12-14, 32-33, 36) while in a flight line with the San Jose airport during which police "had to watch for other aircraft." (J.A. 38.) In any event, Ciraolo appears oblivious to the fact that his test of a search would permit sophisticated technological surveillance which he and defense amici decry to be undertaken without a warrant so long as it was not "focused" at a specific property or, if focused, so long as the property was not closed to ground view.

Ciraolo cites Katz v. United States, 389 U.S. 347 (1967) and United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984) as supportive of his position. However, neither decision aids his argument that police search when they "focus". Certainly the police are not in a better position if they randomly overhear conversations within telephone booths or homes by aiming parabolic microphones. See United States v. Karo, 468 U.S. at ___, 82 L.Ed.2d at 539, 104 S.Ct. at 3302.

Ciraolo simply offers no reason why "generalized" aerial observation of curtilage is to be constitutionally preferred and "focused" observation prohibited. In terms of visual privacy, it is difficult to discern where the difference lies other than the broader scope of the former. Regardless of how a particular aerial observation is characterized - random, routine, focused

or something else - the police look at something specific. The discrimination of the viewer is always "focused" at a particular place in the very act of looking. While Ciraolo stresses that the focus is undertaken by the "practiced eye" of the policeman (Resp. Br. 30), this is true of all criminal investigation. If focusing was relevant, visual discrimination in any kind of police observation of curtilage would suggest that what occurred was a search.

The "focus" argument, thus, threatens to swallow Ciraolo's own test for, at least at the moment of looking, the observation simply is no longer "generalized". If, however, one insists on defining bad focus from good focus, the problem becomes drawing a bright line so that police know in advance what searching is. Do police focus too much if a tip directs them only to an

intersection, a particular street or a group of homes? While Ciruolo does not provide guidance, undoubtedly a premium would be laid on police remaining ignorant, e.g., not to ask an informant too much about specific locations before flying; a result farcical in the very statement of it.

A similar problem exists with respect to Ciruolo's argument that police err when they use an airplane to "jump" a residential fence. (Resp. Br. 5.) Under this argument, Officer Schutz's fatal mistake was in first undertaking ground observation which resulted in discovering the yard was closed to view from the street, activity which Ciruolo explicitly states was lawful. (Resp. Br. 28.) Had police instead flown by Stebbins and Clark Avenues immediately upon receipt of the tip to look at each yard in that vicinity police presumably could not have been found guilty of purposefully evading

Ciraolo's fence. Thus, Ciruolo's argument has "the perverse affect of penalizing the officer for exercising more restraint than was required under the circumstances." Washington v. Chrisman, 455 U.S. 1, 8 (1982). Here again, the lesson to be gleaned by police would be to maximize one's ignorance of what one was seeking and where to find it. It is hard to see what privacy interest is thereby advanced.^{4/}

The Court of Appeal did not state its holding in terms of whether

4. It can be argued that police will usually desire the maximum amount of information in advance of aerial observation if only to make their job easier. To the extent that is true, however, Ciruolo's test rests for purposes of its enforcement on ferreting out how much the police knew and when they knew it as against whatever benefits to police may exist by dissembling on the degree to which they "focused" on a yard or "purposefully evaded" a fence. While we alluded to

police purposefully evaded a fence. Rather, the California court simply concluded that a search occurs where police intentionally look into a specific residential yard protected by a fence like Ciraolo's. (Pet. App. A: 18-19.) Ciraolo's purposeful evasion test is mere gloss obscuring a fundamental defect in the California court's decision: it cannot seriously be argued that fences place an officer in a position to avoid looking from an airplane into curtilage. Once the officer sees a residential fence from the

(FOOTNOTE 4 CONTINUED)

this problem previously (Pet. Br. 43, n. 16), Ciraolo does not discuss it. We think the problem merits attention because likely as not, the result of Ciraolo's test would be to engage the courts in prolonged and quixotic inquiries into whether an officer was truly as ignorant as he might hope to appear. Cf., United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 667, 698, n. 23; 104 S.Ct. 3405, 3421, n. 23 (inquiry into officer's subjective good faith eschewed.)

air, assuming even its visual opaqueness to ground view can be detected, police almost certainly will simultaneously see the yard i.e., "search." As we have previously stated (Pet. 16), in many cases the officer will not know he has "searched" until he has already seen. The ruling Ciraolo seeks to affirm, thus, condemns governmental action as a warrantless search without telling police how to avoid the illegality.

All of this is preliminary to the problem which infects defendant's argument to the same degree it infected the contention of the defendants in Oliver v. United States, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). If, as Ciraolo and defense amici argue, only reasonable measures must be taken to protect curtilage from public view before protection from "focused" aerial observation arises under the Fourth Amendment, but no protection is afforded

where curtilage is already open to "public view", when do those measures become sufficiently "reasonable"?

We quote the amicus curiae brief of the Civil Liberties Monitoring Project in this case:

"To distinguish among Ciraolo's suburban home and a suburban home without a fence; or one with a high wall and many trees around it and one without trees; or a rural home in a remote location protected by dogs and fences and rural home hidden in the woods would only deepen the quagmire of Fourth Amendment jurisprudence." (CLMP Br. 26.)

If the quagmire is deep distinguishing between houses with and without fences - precisely the distinction drawn by the California Court - it is hard to imagine how treacherous the bog may be distinguishing between short and tall fences, or well-maintained and poorly-maintained fences. And it is the officer who would be required to make those distinctions in first instance

while looking from an airplane. Ciraolo's test, like the Court of Appeal's decision, is not aimed at letting police know how to comply with the Fourth Amendment but at frustrating compliance altogether.

The problem of what measures are reasonably required is not merely of abstract interest. Ciraolo's argument that he did everything he could be required to do to preserve the privacy of his yard (Resp. Br. 29) is simply untrue. Perusal of the aerial photograph before this Court with a magnifying glass reveals that Ciraolo's neighbor immediately to the east on Clark Avenue has a pool in his backyard and could see into Ciraolo's yard at will from atop a waterslide adjacent to their common fence. Plainly, Ciraolo took only those measures which he deemed sufficient to protect the degree of privacy he felt was desirable, something

quite different than all measures that could be expected.^{5/}

Ciraolo's argument that he should not be required to "surrender access to air and light" to preclude aerial observation (Resp. Br. 29) might be appealing if the question was whether Fourth Amendment rights can ascend into the airspace to achieve legitimacy. However, the question is not whether they

5. Of course, any number of reasons might exist why Ciraolo did not block his neighbor's view. Perhaps Ciraolo feared a suit for maintenance of a spite fence. (Cal. Civil Code, § 841.4). It might be a covenant or ordinance prohibited it. But this only muddies the waters deeper. In some areas, an aesthetic ordinance or covenant might permit only short picket fences. A person subject to such constraints would seem to be entitled to claim that he too has done all he can reasonably do to protect his privacy. It is not easy to say why that person should be held to have "waived" his Fourth Amendment rights either.

The answer, we submit, is that individual has not waived Fourth Amendment rights because the rights protected do not hinge on fences.

can but under what circumstances. Ciraolo ignores the fact that police aerial observation, even on a routine patrol basis without probable cause or even suspicion, demonstrably did not drive him into a lightproof box. If that is so with respect to a person who clearly has reason to hide, it strains credulity to believe those who lack such reason feel their personal security is jeopardized when aerial observation is undertaken to investigate a specific report. Stated otherwise, if routine air patrol is permissible, then whether one chooses to conceal activity from aircraft - or as Ciraolo puts it to surrender air and light - is a product, not of impermissible governmental presence in navigable airspace, but the individual's expectancy whether something desired to be private will be detected. That expectancy may prove wrong, but the Fourth Amendment, we

submit, does not fill in merely because the chances of discovery appear not worth the trouble of guarding against. And to the extent practicalities make it difficult to protect certain outdoor activities from observation by the police in a public area, that fact suggests it is not private activity in the sense contemplated by the Constitution.

3. The Fact That Police Observe A Residential Yard By Using An Aircraft Does Not Give Rise To Fourth Amendment Violation.

Ciraolo argues that the danger of technological surveillance of the "intimate areas of our lives" justifies a warrant requirement in this case. (Resp. Br. 17.)

The danger petitioner raises is a hypothetical one not involved in this case. If regulation by warrants was justified by the mere potential that aerial observation of the sort herein would reveal intimate activities it would

justify regulation of routine air patrol as well since nothing was seen in this case that could not otherwise be observed by the latter means. The fact is, however, no such "intimate activities" were observed unless everything in backyards, including plants visible to the naked eye in navigable airspace is intimate. It is clear that "potential, as opposed to actual, invasions of privacy [do not] constitute searches for purposes of the Fourth Amendment." United States v. Karo, 468 U.S. at ___, 82 L.Ed.2d at 539, 104 S.Ct. at 3302.

Ciraolo appears to argue that the police view from an aircraft is that of a technologically-aided Peeping Tom. (Resp. Br. 21.) But it is highly unusual to apply that pejorative to a view had by everyone who flies. If the Peeping Tom is not subject to actual criminal or civil liability by his act,

as is frequently the case, he is at least customarily subject to social condemnation, none of which attaches here or to airborne observation generally.^{6/}

6. Ciraolo argues that few people would be expected to fly in an airplane in order to look at his yard for evidence of crime. (Resp. Br. 29-30.) The American Civil Liberties Union restates this as a categorical summation of how the reasonability of privacy expectations should be judged: "In this society, people do not normally expect their neighbors or the general public to surveil their backyards from an airplane." (A.C.L.U. Br. 9.)

To state the question as being whether the public is anticipated to undertake conduct identical in form, purpose and effect to that of police virtually assures that police conduct will be a search. One might just as well say people do not normally expect their neighbors to track their packages with a beeper through the streets, tail them to their door, stake out their house, record the telephone numbers they dial, pose as criminals to monitor their statements inside the home, or, in general, investigate. This should come as less than a surprise, however, since we pay the police to do those things (without a warrant). The argument of Ciraolo and defense amici proves too much. They have forgotten that the Fourth Amendment

(FOOTNOTE 6 CONTINUED)

The core danger of the sophisticated sensory enhancement devices denounced by Ciraolo does not arise from their capacity to reveal something (which is equally true of reading glasses and flashlights) but from their capacity not to reveal themselves. It is the secretive exploitation of technology, which evokes fear of the special capacities of government to insinuate itself into our lives without the ability to verify its presence.

An airplane at a thousand feet can be seen and heard. It is no more surreptitious than standing on a street corner. Indeed, standing on a street corner at least raises the possibility of vision into homes through open windows and doors. In contrast, far

(FOOTNOTE 6 CONTINUED)

protects against unreasonable searches, not detection.

from telling police something about the interior of homes they are interested in knowing, remote aerial viewing for exposed marijuana crops outside the home, even when "focused", tells police nothing about the home's interior at all. Not only does such police activity lack objective secretiveness and the characteristic extension of senses into the home to reveal objects of interest, the technology is not of a type that exists solely, or even principally, in the control of government. Its use is widespread among numerous sectors of society and those uses frequently extend to aerial survey of lands. These considerations reflect little support for the contention that use of an airplane by police in this case was secretive technological sensory enhancement of private activities. Its use did not violate the Fourth Amendment.

CIRAOLO'S ADMINISTRATIVE WARRANT PROPOSAL DOES NOT HARMONIZE WITH FOURTH AMENDMENT PRINCIPLES AND PROVIDES NO GUIDANCE TO MAGISTRATES IN DISCHARGING THEIR WARRANT-ISSUING FUNCTIONS

Ciraolo's predominant theme in this Court has been that warrantless aerial observation by police is an unconstitutional intrusion into the home when focused on a specific yard to gather evidence of criminal activity. Ciraolo argues that a warrant is required whenever police make a nonexigent search of the home without consent to gather evidence. (Resp. Br. 26 citing Michigan v. Clifford, 464 U.S. ___, 78 L.Ed.2d 477, 104 S.Ct. 641 (1984) (plurality opinion).) However, for the first time, Ciraolo suggests - almost as a postscript - that "where the government's inspection needs are obvious", administrative search warrants issued on less than probable cause

afford a "solution" to surveillance situations. (Resp. Br. 30-31.)

Ciraolo's administrative warrant proposal might be squared with his main argument if Clifford held, as he claims, that the police purpose to gather evidence activates a warrant requirement for nonexigent searches of the home. (Resp. Br. 26-27.) Under that interpretation, the governmental intent to look for evidence is relevant to the question whether legitimate privacy expectations exist which require interposition of a warrant requirement, but does not determine the kind of warrant which vindicates those expectations.

However, in so arguing, Ciraolo revises the lead opinion in Clifford. It states: "If a warrant is necessary, the object of the search determines the type of warrant required . . . If the primary object of the search is to gather

evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place searched." ____ U.S. at ____, 78 L.Ed.2d at 484; 104 S.Ct. at 647 (emphasis added.); If Ciraolo was convinced that the police intent to gather evidence rendered their conduct a search, there would be no reason to propose administrative search warrants as a "solution" to logic which, if accepted, would demand a criminal warrant.

It is not difficult to discern the source of Ciraolo's discomfort causing him to rewrite Clifford. As he appears to recognize, the governmental need for aerial observation to interdict the vast marijuana industry in the United States is at least as obvious as the need for various regulatory inspections authorized by administrative

warrants.^{7/} This obvious need cannot be satisfied by criminal warrants. In those cases where traditional probable cause is obtained, police have little incentive to defer application for a warrant authorizing an immediate physical search of the premises.

Although Ciruolo insists that he seeks nothing more than regulation of "focused" aerial observation of fenced residential yards, adopting his argument encourages police to conduct unfocused, area-wide observation from aircraft without a warrant. Inevitably, the next step would be to demand that such routine

7. During 1985, California's inter-agency task force, the Campaign Against Marijuana Planting (CAMP), seized in excess of 817,000 pounds of marijuana, including over 165,000 plants, with an estimated wholesale value of \$332 million. Of the 684 sites, 72% were located on private property. With wholesale values ranging from \$1,500 to \$2,000 a pound (see Brief of Americans for Effective Law Enforcement Inc.: 8), cultivators make significant profits from just a few dozen plants.

patrol be equated with "focused" aerial observation so as to subject all such observations to a warrant requirement.^{8/} Taking that step is less likely when it is realized that criminal search warrants defeat resort to aerial observation altogether.

If Ciruolo's administrative warrant proposal only fits his focus argument rather uncomfortably, it bursts the seams of his argument that the aerial observation of his yard is equivalent to a physical search of his home. The justification for permitting administrative searches on less than traditional probable cause lies not only in the important interest in abating public health hazards and the essentially non-criminal focus of the

8. Indeed, cases are currently pending in the California state courts in which defendants seek expansion of the decision under review to achieve just that.

inspection, but also in the basic recognition that such searches typically involve "relatively limited invasion[s]" of individual privacy interests. Camara v. Municipal Court, 387 U.S. 523, 537 (1967). Ciraolo simply cannot be right in equating observation of his yard from aircraft to physical searches of the home, the chief evil addressed by the Fourth Amendment, if the invasion is, in reality, so minimal as to be satisfied by an administrative warrant.

In any event, administrative warrants are not consideration exchangeable in return for legitimizing privacy expectations which society deems unreasonable. Cases in which administrative warrants were required "turned upon the effort of the government inspections to make nonconsensual entries into areas not open to the public." Donovan v. Lone Steer Inc., ___ U.S. ___, 78 L.Ed.2d 567,

572, 104 S.Ct. 769 (1984). No such entry was made in this case.

Moreover, administrative probable cause rests upon compliance with "reasonable legislative, administrative, or judicial standards for conducting an inspection . . . with respect to a particular dwelling." Michigan v. Clifford, 464 U.S. at ___, n. 5; 78 L.Ed.2d at 484, n. 5; 104 S.Ct. at 647, n. 5. Ciraolo does not suggest any standards. Instead, he simply asserts that "a neutral magistrate could best devise appropriate procedures to protect the backyards of persons . . . from intrusion by visual or photographic surveillance." (Resp. Br. 26.)

While that argument is less than focused, Ciraolo's "solution" appears aimed at simply throwing the issue to magistrates to figure out how police can see residential fences from aircraft without simultaneously viewing

yards. Disparate results of magistrates designing flight plans for police would be inevitable. Fourth Amendment rights would be inequitably enforced. Given the difficulty of ensuring compliance with arbitrary standards set by judicial officers ill-equipped to act as Fourth Amendment flight controllers, magistrates in many cases undoubtedly will prefer to indulge in vague directives in this new form of warrant tantamount to injunctions telling police to fly but not to see (or at least not to sin when they do see).

Ciraolo agrees that ad hoc determinations of what is permissible should be avoided. (Resp. Br. 26.) We can think of nothing better aimed at compelling such determinations than his own proposal. It does not vindicate legitimate privacy expectations, much less provide meaningful guidance to police, to invent warrants grounded on the individual predilection of

magistrates and justified on the unfounded premise that airborne officers can avert their eyes from yards when fences are seen.

III

THE COURT OF APPEAL ERRED
UNDER THE FOURTH AMENDMENT

The privacy secured by the Fourth Amendment is categorically different than a mere hope that things exposed outside the home are unlikely to come to the government's attention. The concern of the authors of the Amendment was not to throw up invisible shields to the commonplace vision routinely experienced in a three dimensional world, but to ensure protection against the unreasonable searches and seizures they had so recently suffered during which the security of persons, their homes, papers and effects was, in every measure, violated. It is a highly dubious proposition that in seeking to secure the liberty denied the people who created this nation from the oppressions wreaked by the general warrant and writs of assistance, what was uppermost on their

minds was the sheriff's gimlet-eye from the stockade rampart or church belfry.

The Court of Appeal confused the security of the home with the hope of nondiscovery. Ciraolo's marijuana garden was fully open to view by police on routine air patrol. There is no reason why police should be held to have lawfully viewed it merely because they suspected its existence in advance. To order police to distinguish between open fields and fenced residential yards in the course of remote observation from navigable airspace is neither practical nor in accord with the expectations of people in the use of their outdoor property. The Fourth Amendment should not be interpreted to protect Ciraolo's yard in a way which eludes meaningful enforcement and frustrates the ability of the police to understand what is

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expected of them. The Court of Appeal's decision is defective for all these reasons.

CONCLUSION

Petitioner respectfully requests that the judgment of the Court of Appeal be reversed.

DATED: November 27, 1985

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AUG 2 1985

IN THE

JOSEPH F. SPANIOLO, JR.
CLERK**Supreme Court of the United States**

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAULO,

*Respondent.*ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT**BRIEF AMICI CURIAE OF
AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT INC.****JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE AIRBORNE LAW ENFORCEMENT
ASSOCIATION, INC.,
AND THE
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TABLE OF CONTENTS

	PAGE
Table of Authorities.....	ii
Interest of Amici	2
Argument	4

I.

THE WARRANTLESS AERIAL SURVEILLANCE OF THE DEFENDANT'S FENCED BACKYARD, CONDUCTED FOR THE PURPOSE OF DETERMINING WHETHER MARIJUANA WAS BEING GROWN THERE, DID NOT VIOLATE THE DEFENDANT'S PRIVACY RIGHTS UN- DER THE FOURTH AMENDMENT.	4
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II.

AS A MATTER OF SOUND JUDICIAL POLICY, THE RIGHT TO PRIVACY SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE OF LARGE SCALE MARIJUANA GROWING OP- ERATIONS.....	7
CONCLUSION	10

IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 16 of the Supreme Court Rules. Counsel to the petitioner are: Hon. John H. Yan De Kamo, Attorney General, State of California, Counsel for the Petitioner, and Marshall W. Krauss, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Brown v. Texas</i> , 460 U.S. 730, 103 S.Ct. 1535 (1983).....	4, 9
<i>Oliver v. United States</i> , ____ U.S. ____, 104 S.Ct. 1735 (1984).....	6
<i>People v. Ciraolo</i> , 161 Cal. App.3d 1081, 208 Cal. Rptr. 93 (1984).....	6
<i>United States v. Knotts</i> , 460 U.S. 276, 103 S.Ct. 1081 (1983).....	9

Statutory Materials

14 C. F. R. Part 91.79	8
------------------------------	---

Digests and Articles

Annotation, " <i>Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure</i> ," 56 ALR Fed 772 (1982).....	9
Granberg, " <i>Is Warrantless Aerial Surveillance Constitutional</i> ," 55 Cal. St. Bar J. 451 (1980)	9
Kaye, " <i>Aerial Surveillance: Private versus Public Expectations</i> ," 56 Cal. St. Bar J. 258 (1981)	9
Lindsey, " <i>Raids Reduce California Marijuana Planting 40%</i> ", New York Times, July 25, 1985..	8

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ON WRIT OF CERTIORARI TO THE
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BRIEF AMICI CURIAE OF
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JOINED BY

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CHIEFS OF POLICE, INC.,

THE AIRBORNE LAW ENFORCEMENT
ASSOCIATION, INC.,

AND THE

LEGAL FOUNDATION OF AMERICA,
IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. John K. Van De Kamp, Attorney General, State of California, Counsel for the Petitioner, and Marshall W. Krause, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty two times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. is a professional service organization and is incorporated as a not-for-profit California corporation. The group has nearly 700 members, all of whom are full-time law enforcement pilots or flight support personnel. The association sponsors an annual three-day national training conference, and six regional aircraft safety seminars each year. Its bi-monthly magazine, *Air Beat*, is dedicated to the safe utilization of aircraft for law enforcement purposes.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt

or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's interest in the instant case arises from our concern that the decision of the court below will unduly hamper the crucial efforts of state and federal law enforcement agencies in their aerial surveillance of illegal marijuana crops. As will be demonstrated, aerial surveillance is the only effective means at the disposal of law enforcement agencies to counter the problem of illegal marijuana cultivation, especially large scale illegal operations.

ARGUMENT

Americans for Effective Law Enforcement, Inc. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the International Association of Chiefs of Police, Inc., and other national and state law enforcement groups. Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid, rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law, although we fully agree with the legal analysis submitted by the State of California in this case. We confine our brief basically to a suggested resolution of certain important policy issues involved in this case as they pertain to the serious problem of narcotic law enforcement. We have previously made similar arguments in our *amici* brief filed in *Oliver v. United States*, ____ U.S. ____, 104 S.Ct. 1735 (1984), and we repeat these arguments as even more relevant now, since the instant case involves aerial surveillance by law enforcement officers.

I.

THE WARRANTLESS AERIAL SURVEILLANCE OF THE DEFENDANT'S FENCED BACKYARD, CONDUCTED FOR THE PURPOSE OF DETERMINING WHETHER MARIJUANA WAS BEING GROWN THERE DID NOT VIOLATE THE DEFENDANT'S PRIVACY RIGHTS UNDER THE FOURTH AMENDMENT.

In this case, the Defendant's land containing the marijuana field lies in close proximity to a regional commercial airport. This fact, together with the approximate distance of two and one half miles separating the marijuana from the airport proper, would be well known to persons in the vicinage and

could be taken into account, even if not in the record.¹ The record, in fact, affirmatively shows that the marijuana field lay directly beneath the flight path of aviation into and out of the regional airport, because the record shows that the officers had problems in avoiding trespass upon the paths of aviation in the flight path. Joint Appendix at p. 38 (Officer Shutz: "We had to watch for other aircraft. We were in a flight line with the San Jose airport.")

Amici submit that the inference that thousands of citizens a day may well have overflown this location is fully justified. In the course of a year, overflight observations by citizens could well number in the hundreds of thousands. Such citizens' inability to recognize marijuana, reluctance to make report upon it, or other reasons for non-reporting, are the apparent reasons for the undisturbed growth of Defendant's crop. A warrant based upon such citizens' observations would be appropriate. These considerations both indicate the appropriateness of the officers' conduct and destroy the Defendant's contention that he had a reasonable expectation of privacy from overflight observation of a sight that thousands of people had likely seen in the course of normal aviation. Furthermore, in fashioning a constitutional rule, the Court should consider not only the record facts, but the likelihood, in the setting of a metropolitan homestead, that there will be a metropolitan airport, or many such airports, from which routine overflights will occur involving thousands of persons daily.

There can be no question that the officers had a right to be present in the place in which they were. There can likewise be no doubt of the likelihood that thousands of citizens properly have observed the same sight that the officers saw here. Further, the officers used no powers of observation or otherwise that were not available to citizen observers. The holding by the

¹ These facts are not only notorious to persons of the vicinage but are reflected in sources, such as maps, of which courts readily take judicial knowledge.

court below, *People v. Ciraolo*, 161 Cal. App.3d 1081, 208 Cal. Rptr. 93 (1984), that their conduct was an illegal search is inconsistent with these propositions.

Furthermore, after this Court's decision in *Oliver v. United States*, ____ U.S. ____, 104 S.Ct. 1735 (1984), the officers even had the right to overfly for the purpose and with the intention of observing fields of marijuana. The decision below stands for the erroneous proposition that such an officer, rightfully where he is and exercising no powers not available to thousands of other citizen observers, must somehow avert his gaze upon encountering a high fence in his view from the air. An officer thus conducting an *Oliver*-approved overflight would presumably be required to recognize such a fence—a perception that might be difficult from the perspective of airplane flight—and distinguish it from surrounding areas. He would then be required, presumably, to avert his gaze, since it is the act of observation that, in and of itself, violates the asserted privacy interest in question. Indeed, the proper observation of items seen inadvertently because they were in plain view during a lawful *Oliver*-approved overflight would presumably be suppressed under such reasoning. This result is unrealistic because observations from the sky cannot be compartmentalized in such a manner, and it is equally unrealistic to exact such anomalous behavior from airborne officers with respect to sights seen by thousands of similarly situated airborne citizens. It would be no less logical to hold that police officers observing a crime from their patrol vehicle must ignore it if it takes place in a citizen's backyard, since the airplane, the officers, and the opportunities for similar citizens' observations are similar in their propriety.

II.

AS A MATTER OF SOUND JUDICIAL POLICY, THE RIGHT TO PRIVACY SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE OF LARGE SCALE MARIJUANA GROWING OPERATIONS.

Amici's interest in this case specifically focuses on the aerial surveillance of fields which are used to cultivate large quantities of marijuana. Many states have highly effective aerial detection and abatement programs. For example, as pointed out in *amici's* brief in *Oliver v. United States*, *supra*, the Florida Department of Law Enforcement, during calendar 1982, confiscated approximately 43,000 marijuana plants at 337 sites in 41 of the state's 67 counties. At least 95 percent of those seizures were solely the result of an initial aerial surveillance by fixed-wing aircraft, flying at 1,000 feet or higher above ground level. (These facts are revealed in the letter of Feb. 16, 1983, from Robert Cummings, Bureau Chief, Investigative Support Services Bureau, Florida Department of Law Enforcement, included in the Appendix of our brief in *Oliver*).

The Bureau of Narcotic Enforcement of California's Department of Justice operates two fixed-wing aircraft; the United States Drug Enforcement Agency also operates a fixed-wing airplane in the State of California. Together, the three aircraft log approximately 500 hours per year of flight time at heights of 1,000 to 2,000 feet, for marijuana detection purposes. In addition, several rural sheriff's departments and the forestry service operate fixed-wing and rotary aircraft, which are used intermittently for the detection of cultivated marijuana fields.

Seizures in California during 1982 involved 90,367 plants, a total of 134,107 pounds from 1,152 crops. The Chief of the California Bureau of Narcotic Enforcement has estimated that at least 70 percent of the domestic marijuana seized by a search warrant resulted from aerial observations. (These facts are found in a letter of March 3, 1983, from S. C. Helsley, Bureau of Narcotic Enforcement, California Department of Justice, as it appears in the Appendix of our brief in *Oliver*).

Typically, programs like those in California and Florida engage in routine air patrol over counties where marijuana has been previously cultivated. The plants are readily observable at even 2,000 feet or more altitude. In fact, pilots rarely fly low, in order that their observations will not be detected by the growers, and also to ensure the safety of the law enforcement officers. Once a sighting is made, photographs are usually taken. Later the observing officer will file an affidavit in support of a search warrant, accompanied by the photographs.

Aerial surveillance programs are not ordinarily aimed at the private, recreational use of marijuana by a citizen, but at large scale, commercial production. A field devoted to commercial production may have as many as 1,000 plants, with a weight of 2,500 pounds and a wholesale value of \$1,500 to \$2,000 a pound. The effectiveness of such programs was recently reported by Robert Lindsey in the article, "*Raids Reduce California Marijuana Planting 40%*", New York Times, July 25, 1985, p. 10, wherein it was reported that the California program using aerial surveillance had dramatically reduced commercial marijuana growing in that state.

Flight levels are regulated by the Federal Aviation Administration (FAA), United States Department of Transportation (14 C. F. R. Part 91.79). Regulations for fixed-wing general aviation craft establish a minimum height level of 1,000 feet over cities and 500 feet over sparsely populated areas, although one regulation (subpart (d)) provides that helicopters may travel just above ground level, so long as the craft can make a safe landing in an emergency and avoid other hazards. Law enforcement agencies, such as the California Bureau of Narcotic Enforcement and the Florida Department of Law Enforcement, fly fixed-wing aircraft in excess of 1,000 feet and are still able to observe and photograph marijuana-cultivated plots.

Amici submit that every landowner is aware of the fact that many thousands of private aircraft are operated for pleasure, crop dusting, pipeline inspection, traffic control and speed detection, and other purposes, at regulated levels. The actual number of private aircraft registered with the FAA, as of 1981, was 257,536. No landowner, therefore, can *reasonably* expect that aircraft will avoid his property, or that the occupants will not look down during overflights.

If the Court is disposed in this case to affirm the decision of the court below, which *amici* submit is not warranted on Fourth Amendment principles, especially in view of the apparent good faith of the law enforcement officers, it should be made clear that the Court's decision will not affect the legality of aerial surveillances for the purposes described in Section II of this brief, i.e., large-scale marijuana growing operations. A person may have a reasonable expectation that narcotics officers will not trespass on his land, evade gates or jump fences, but that person does not have a reasonable expectation that aircraft will not lawfully fly over his property and observe a narcotics growing enterprise in full operation.²

² See Annotation, "*Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure*", 56 ALR Fed 772 (1982); Granberg, "*Is Warrantless Aerial Surveillance Constitutional?*" 55 Cal. St. Bar J. 451 (Nov. 1980); Kaye, "*Aerial Surveillance: Private Versus Public Expectations*," 56 Cal. St. Bar J. 258 (June 1981). The use of visual enhancement aids (such as flashlights) also have been consistently upheld by this Court, see e.g., *Brown v. Texas*, 460 U.S. 730, 103 S.Ct. 1535 (1983) and cases cited therein. In that regard, this Court's unanimous decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 1086 (1983), adds that "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," referring to the so-called "bumper-beeper."

CONCLUSION

Amici respectfully submit that the decision of the California Court of Appeal should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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Supreme Court, U.S.

FILED

AUG 8 1985

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRACLO,
Respondent.

On Writ of Certiorari to the
California Court of Appeals
for the First District

BRIEF FOR THE CRIMINAL JUSTICE
LEGAL FOUNDATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether aerial surveillance by police of a fenced residential yard constitutes a search under the Fourth Amendment of the United States Constitution.

2. If such activity does constitute a search, is it nonetheless permissible under the Fourth Amendment absent the existence of probable cause or a warrant.

TABLE OF CONTENTS

	<u>Page</u>
Questions presented.....	1
Table of Authorities cited.....	111
Interest of the Criminal Justice Legal Foundation.....	1
Summary of argument.....	2
Argument.....	4
I	
AERIAL SURVEILLANCE OF RESIDENTAL AREAS DOES NOT CONSTITUTE A SEARCH WITHIN THE TERMS OF THE FOURTH AMENDMENT.....	4
A. Aerial Surveillance is a Form of Open Fields Observation.....	4
B. Aerial Surveillance Violates No Reasonable Expectation of Privacy.....	17
II	
IF THE POLICE CONDUCT HEREIN DOES CONSTITUTE A SEARCH IT IS NONETHELESS REASONABLE ABSENT PROBABLE CAUSE OR A WARRANT.....	27
Conclusion.....	32

TABLE OF AUTHORITIES CITED

Page

Cases

<u>Air Pollution Variance</u>	
<u>Board v. Western Alfalfa</u>	
416 U.S. 861, 865 (1974).....	9,11
<u>Florida v. Royer</u>	
460 U.S. 491, 520 (1983).....	6
<u>Hester v. United States</u>	
265 U.S. 57 (1924).....	3,7,8
<u>Hudson v. Palmer</u>	
468 U.S. _____, 82 L.Ed.2d 383	
402 (1984).....	19,20
<u>INS v. Delgado</u>	
U.S. _____,	
80 L.Ed.2d 247 (1984).....	20,27
<u>New Jersey v. T.L.O.</u>	
469 U.S. _____, 83 L.Ed.2d 720.....	30,32
<u>Oliver v. United States</u>	
466 U.S. _____, 80 L.Ed.2d 214	
(1984).....	2,6,7,15,16
<u>Texas v. Brown</u>	
460 U.S. 730 (1983).....	26
<u>United States v. Brignoni-Ponce</u>	
422 U.S. 873 (1975).....	4

TABLE OF AUTHORITIES
(Continued)

Page

Cases

<u>United States v. Jacobsen</u> — U.S. — 80 L.Ed.2d 85.....	18
<u>United States v. Karo</u> 468 U.S. —, 82 L.Ed.2d 530 (1984).....	3,12,13
<u>United States v. Knotts</u> 460 U.S. 276, (1983).....	3,10,12,14,17,19
<u>United States v. Martinez-Fuerte</u> 428 U.S. 543 (1976).....	4,29
<u>United States v. Mendenhall</u> 446 U.S. 544 (1980).....	22

Other Authorities

<u>Browning, F., Eyes In The Sky,</u> California Lawyer, p 45, Aug 1985.....	22,23
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IN SUPPORT OF PETITIONER**

**INTEREST OF THE CRIMINAL JUSTICE LEGAL
FOUNDATION**

The Criminal Justice Legal Founda-
tion is a non-profit law firm organized
to advance the citizenry's interest in a

system of criminal justice which accords full respect to their rights to the peaceful enjoyment of their lives, liberties and properties.

The law regarding search and seizure symbolizes, to the public mind, the plethora of technical rules of procedure promulgated to provide full respect to the rights of defendants without regard to the legitimate countervailing rights of victims and society. As a non-governmental advocate of these rights of the citizenry, the Criminal Justice Legal Foundation has a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

The California Court of Appeal's decision in this case has failed to heed the lessons not only of Oliver v. United States 466 U.S. _____, 80 L.Ed.2d 214 (1984) but also of United States v.

Knotts 460 U.S. 276, (1983) and United States v. Karo 468 U.S. ___, 82 L.Ed.2d 530 (1984). Those cases demonstrate that the concern with privacy of a residence's curtilage, as compared to open fields (see Hester v. United States 265 U.S. 57 (1924)) is one of physical intrusion, as opposed to visual surveillance. Since aerial surveillance of the nature involved here, i.e., from a minimum height of 1000 feet, performed without use of enhancing devices, does not raise any issue of physical intrusion, the question of the sanctity of the curtilage never arises.

Having declared this surveillance a "search" the court then failed to engage in identification and balancing of the competing interests at stake. This process, is the fundamental core of Fourth Amendment adjudication. See

e.g., United States v. Brignoni-Ponce 422 U.S. 873 (1975), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

Even if the court were correct in defining the activity as a "search," an assessment of the weight of the public interest in eradication of domestic drug cultivation in comparison to this minimal form of intrusion upon respondent's privacy interests, leads to the conclusion that the surveillance is justified under the Fourth Amendment.

ARGUMENT

I

AERIAL SURVEILLANCE OF RESIDENTIAL AREAS DOES NOT CONSTITUTE A SEARCH WITHIN THE TERMS OF THE FOURTH AMENDMENT

A. Aerial Surveillance is a Form of Open Fields Observation.

This case involves unaided visual observation of a residential backyard from a height of 1000 feet. The resi-

dence is a tract home in a major metropolitan area not far from a full service commercial airport. There is no evidence of hovering, low-level flying, or utilization of advanced technologies such as satellite photography or computer assisted enhancement of photographic images. That this activity was found to be a violation of respondent's reasonable and legitimate expectations of privacy "betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disk has landed on than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent. Analyzed simply in terms of its 'reasonableness' as that term is used in the Fourth Amendment, the con-

duct of the investigating officers ... would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of ... Fourth Amendment jurisprudence." Florida v. Royer 460 U.S. 491, 520 (1983). Rehnquist, J., with Burger C.J. and O'Connor, J. diss..

The natural starting point for analysis is Oliver. Narcotics agents for the state of Kentucky, acting on a tip, went to Oliver's farm, drove past the farmhouse to a locked gate posted "No Trespassing" and walked around it. They passed a barn, then a camper from which someone shouted at them, and proceeded to a field of marijuana over one mile from the farmhouse. Oliver, supra, 466 U.S. at ____, 80 L.Ed.2d at 220-221. In the companion case the police received a tip marijuana was being grown

in the woods behind Thornton's house. They "entered the woods by a path between this residence and a neighboring house" id., at 221, and located marijuana.

In both instances the police trespassed on private property, passing by or within the curtilage of the respective residences. Nonetheless, the searches were held valid because "[T]he 'open fields' doctrine, first enunciated by this Court in Hester v. United States, 265 U.S. 57...(1924), permits police officers to enter and search a field without a warrant." Id. at 220, emphasis added. The "open fields" doctrine speaks then to physical entry onto areas outside the curtilage. This, of course, is what happened here when the police surveilled respondent's yard from the airspace over his property. The

doctrine is not directly concerned with visual observations made from such a vantage point. This is precisely the point upon which the court below, and respondent, in his Brief In Opposition To Petition For Writ Of Certiorari (hereinafter Opposition) suffer some confusion. Both speak as if it is observation of, rather than physical entry into, the curtilage, which constitutes a "search" under the Fourth Amendment. Yet this cannot be the case.

The statement of facts in Hester, supra, are somewhat sketchy, but indicate that revenue officers hidden 50-100 yards from a house observed an illegal sale of an alcoholic beverage at the door of the house, i.e., clearly within the curtilage. It was the determination that their vantage point was outside the curtilage which led the court to rule

that no "search" had occurred. In the words of Justice Douglas, writing for a unanimous court in Air Pollution Variance Bd. v. Western Alfalfa 416 U.S. 861, 865, (1974) "The Court in Hester v. United States, 765 U.S. 57, 59 ..., speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in 'the open fields.'"

It is this distinction which lies at the base of the differing results reached in Knotts and Karo. In Knotts a beeper installed in a drum of chemicals had been monitored to its resting place outside a cabin. Visual observation of movement of the drum outside the cabin was then maintained by law enforcement officials. The court distinguished electronic monitoring that yields information concerning the inside of the cabin from instances where information obtained pertains to its outside.

Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned:

* * * *

But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.' Hester v. United States, 265 U.S. 57 United States v. Knotts, supra, 460 U.S. at 282, emphasis added.

Granted, the choice of language in both Western Alfalfa and Knotts is ambiguous, and could be read, in the abstract, to refer to observations of things within, rather than from, open fields. Neither case will admit of such an interpretation within its factual context. In Western Alfalfa the observations were of chimney emissions in violation of air quality standards. There was no issue as to the category of the property upon which the chimneys stood - what was determinative was the observer's vantage point. "The field inspector was on respondent's property, but we are not advised that he was on premises from which the public was excluded." Western Alfalfa, supra 416 U.S. at 865. In Knotts the decisive point was that "[v]isual surveillance from public places along Petschen's

route or adjoining Knott's premises would have sufficed to reveal all these facts to the police." Knotts, supra 460 U.S. at 282.

That it is the position of the observer, rather than the observed, which is determinative of the existence of a search was made clear in Karo, which again involved electronic monitoring of chemicals via a "beeper." The significant question posed by that case for present purposes was "whether monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance." Karo, supra 468 U.S. ___, 82 L.Ed2d at 536. The answer: "For purposes of the [Fourth] Amendment, the result is the same [as an unwarranted surreptitious government agent's entry

into a residence] where, without a warrant, the government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." Id. at 541, emphasis added. The rationale for this conclusion, and the distinction of Knotts, were stated in the following terms.

The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The case is thus not like Knotts,

for there the beeper told the authorities nothing about the interior of Knott's cabin. The information obtained in Knotts was 'voluntarily conveyed to anyone who wanted to look...' [citation]; here, as we have said, the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified.

Id. at 541-42.

Therefore, the question before the Court of whether or not a "search" occurred hinges upon whether the observations made by the police here were made from a position akin to that of the open fields, not whether the observed objects were located within respondent's curtilage. The only rational analysis equates open skies with open fields.

Not only can they not be equated with curtilage, but to do so would place greater constraints on a police officer occupying publicly accessible airspace than upon that same officer trespassing on posted, fenced private property to gain a visual vantage point of residential curtilage. Moreover, such an analysis would stand Oliver on its head. There it was noted that to deny the police the ability to traverse open fields would simply send them to the skies "to gather the information necessary to obtain a warrant or to justify warrantless entry into the property" Oliver, supra 80 L.Ed.2d fn 9 at 224. The logic of the opinion below would have the court order the police out of their aircraft in order to physically invade private property outside residential curtilage. "It is not easy to see

how such a requirement would advance legitimate privacy interests." Id. at 225.

To bolster his legal arguments respondent sets up a judicial domino theory - if we don't stop it here, "it is hard to find any basis for denying the overseers the right to high-powered gyroscopic binoculars and advanced optics photography to allow a detailed and leisurely scrutiny of whatever comes into view from the air." Opposition, supra at 8-9. While he admits there "are many answers to a parade of horrors" (id.), we would advance only one.

Respondent...expresses the generalized view that the result of the holding sought by the Government would be that 'twenty-four hour surveillance of any citizen of this country will be

possible, without judicial knowledge or supervision.'....But the fact is that the 'reality hardly suggests abuse,' *Zurcher v. Stanford Daily*, 436 U.S. 547, 566...(1978); if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be appropriate. *Ibid.* Knotts, supra, 460 U.S. at 283-84.

B. Aerial Surveillance Violates No Reasonable Expectation of Privacy.

If the Court were to reject the constitutional similarity between open fields and open skies it is still the case that the surveillance at issue meets the requirements for a finding

that the "search" was "reasonable" in Fourth Amendment terms.

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen ___ U.S. ___, 80 L.Ed.2d 85, 94, fn. om.. This concept of reasonability is "critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" for "a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered." Id., at 100. The test, then, is two pronged, asking first if there has been exhibited a subjective expectation of privacy, second, if that expectation is "justifiable," "reasonable" or "legitimate." See Hudson v. Palmer 468 U.S. ___, 82

L.Ed.2d 393, 402 (1984), Knotts, supra 460 U.S. at 280-81. These two prongs are not evenly weighted; "[t]he Court has always emphasized the second of these two requirements.'The analysis must...transcend the search for subjective expectations.... [W]e should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.' [Citation]" Hudson, supra, 468 U.S. ___, 82 L.Ed.2d 402, fn. 7.

The terms reasonable, justifiable or legitimate must be assessed in terms of the Fourth Amendment if they are to have any contextual grounding. The informative principle of the Fourth Amendment was recently described in the following manner. "The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed

'to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals' United States v. Martinez-Fuerte, 428 U.S. 543, 554... (1976)" INS v. Delgado ___ U.S. ___, 80 L.Ed.2d 247, 254 (1984). This necessarily leads to a balancing of interests, weighing the interest of society in the particular law enforcement objective at hand against the privacy interest of the person subject to official scrutiny. See e.g., Hudson, supra, 468 U.S. at ___, 82 L.Ed.2d at 403-04. Is the law enforcement objective significant; does the practice at issue further that interest in a manner otherwise difficult to achieve; how much of an intrusion into an individuals privacy does the practice constitute; is

the individuals privacy relatively in-
violate absent the existence of the
challenged practice?

The Court is already well aware of
the interest of society in stemming the
flow of illegal drugs into the under-
ground stream of commerce.

The public has a compelling
interest in detecting those who
would traffic in deadly drugs
for personal profit. Few prob-
lems affecting the health and
welfare of our population, par-
ticularly our young, cause
greater concern than the esca-
lating use of controlled sub-
stances. Much of the drug traf-
fic is highly organized and
conducted by sophisticated
criminal syndicates. The pro-
fits are enormous. And many

drugs...may be easily concealed.

As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. United States v. Mendenhall 446 U.S. 544, 561-62 (1980), Powell, J. conc.

The agricultural output of California is unmatched in the United States, yet marijuana is believed by many to be its most lucrative crop, worth an estimated \$2 billion annually. Browning, F. Eyes In The Sky California Lawyer, p. 45, Aug 1985. In portions of the state an "avowedly outlaw subculture that enjoys wide local support" has developed. Id. at 46. Without aerial surveillance law enforcement officials would be unable to locate the small gardens scattered all over rural areas,

as well as those planted by cottage industry specialists such as the respondent. At present it is estimated that only 10 percent of the crop is located by officials. Id at 49. This reduces the situation to a "cat and mouse game" where growers sow their seeds and take their chances, according to one long time grower. Id. at 46. If the Court removes the threat of discovery by aerial surveillance it is signing over large portions of the state to marijuana farmers - not just the rural areas, but also thousands upon thousands of urban and suburban backyards where cultivation can be hidden from horizontal view with the use of fences, surrounding vegetation and the like.

The degree of intrusion upon privacy in this and similar cases is de

minimis. The record before the Court contains the photograph taken of respondent's residence by the police officer from his aerial vantage point. No scrutinizing of personal papers or effects is possible from the position represented by that photograph. The residence is surrounded by other houses. Its backyard is visible from trees on adjacent lots, as well as the roofs of several of those houses. It is safe to assume that roofers, T.V. antennae installers, children climbing trees, as well as utility persons with water, electric, gas and streetlight companies would, at various times, be in a position affording scrutiny of respondent's yard to a far greater extent than that allowed by unaided visual observation at 1000 feet.

More importantly, any person in the navigable airspace occupied by the police herein would be in a position to make the very same observations. Respondent lives in a town which is part of a major metropolitan area. Santa Clara is adjacent to San Jose, which possesses a full service commercial airport. A naval base, complete with air strip, exists at Moffett Field, several miles away. The neighboring cities of San Francisco and Oakland possess international airports. Radio stations in the area (e.g., KGO radio at 810 KHZ) provide traffic reports at commute hours, utilizing helicopters and airplanes to surveil ground activity.

Given all these factors, the intrusion upon respondent's privacy cannot be considered unexpected or unusual in any constitutional sense. There simply is

no reasonable expectation that his yard was beyond the field of view of large numbers of persons on any given day. "The general public could peer into the interior of [respondent's yard] from any number of angles; there is no reason [Schutz] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy Katz v. United States, 389 U.S. 347, 361.... In short, the conduct that enabled [Schutz] to observe [respondent's yard] was not a search within the meaning of the Fourth Amendment." Texas v. Brown 460 U.S. 730, 740 (1983).

II

**IF THE POLICE CONDUCT HERREIN
DOES CONSTITUTE A SEARCH IT IS
NONETHELESS REASONABLE ABSENT
PROBABLE CAUSE OR A WARRANT**

The majority in INS v. Delgado 80 L.Ed.2d 247 (1984) found "factory sweeps" by INS agents to constitute neither seizures of the work force in general, nor detention of those workers taken aside for brief questioning. There was in the majority's view simply no conduct possessing Fourth Amendment significance. The result is analogous to that proffered in the foregoing analysis. Justice Powell, however, wrote a concurring opinion which agreed with the result reached by the majority in spite of the fact he found a Fourth Amendment seizure to have occurred. His reasoning is fully applicable to the instant situation as an alternative

means of concluding Schutz's activity was legitimate.

Powell relied upon the analysis in Martinez-Fuerte in reaching his decision. Like Delgado, that case concerned the vexing problem of controlling the flow of illegal immigrants into the United States, and involved a balancing of the interests at stake. Unlike the first order balancing utilized to ascertain if in fact the Fourth Amendment is involved, this balancing tests admits the presence of the Fourth Amendment, but looks to weighing the reasonableness of the activity within its confines.

In Martinez-Fuerte the substantiality of the government's interest in stemming the influx was measured against the minimal intrusion of stops at check points "involving only a question or two and possibly the production of docu-

ments." Id. at 259. It was also significant the steps were public and regularized allowing field officers only limited discretion. Given those factors the Court held both initial stops and "slightly longer secondary inspection" were permissible absent even "individualized" suspicion "of the presence of illegal aliens." Id. Powell found factory sweeps to be correspondingly reasonable.

We have outlined above the enormity of the problem with drug cultivation in California. Unaided aerial surveillance from navigable airspace involves the most minimal of intrusions, much less in fact than either stopping cars at fixed check points or calling employees aside to question them at work. The police activity is nothing if not public, and vests little discretion in a police

officer to be abused, since he is confined to mere observation at a significant distance.

Given such minimal intrusion, and the fact that the conduct in issue is as unintrusive as possible, the scales which read "reasonable" in Martinez-Fuerte should be found to yield a similar determination here.

This analysis is consistent with the recent explication of this balancing rationale in New Jersey v. T.L.O. 469 U.S. ____ 83 L.Ed.2d 720, 731-32.

To hold that the Fourth Amendment applies ... is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be rea-

sonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails."

Camara v. Municipal Court, supra, at 536-537.... On one side of the balance are arrayed the individuals legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

While Justice Blackmun concurred only in the result, believing the balancing test to be appropriate not as a

general rule, but only "when we [are] confronted with 'a special law enforcement need for greater flexibility' [citation]" (*id.* at 741, Blackmun, J. conc.), it remains that this is one of those special circumstances. Just as "a roving Border Patrol may stop a car and briefly question its occupants...based in part upon 'the absence of practical alternatives for policing the border' [citations]" (*id.*), a roving aircraft in navigable airspace may conduct ground surveillance for drug cultivation due to the lack of practical alternatives.

CONCLUSION

Drug abuse is a major social problem in the United States and aerial surveillance of the nature at issue here is a significant weapon in the war to halt such abuse. On August 5, 1985, the

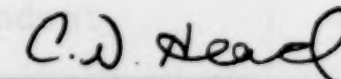
federal government, in cooperation with all 50 state governments, initiated a campaign to locate illegal crops throughout the nation, making use of helicopters and airplanes to locate areas of cultivation. This campaign stands as an acknowledgment by all sovereign authority in the United States that such tactics are necessary and proper tools in the drive to eradicate drug abuse. Given a) the lack of any intrusion upon a reasonable expectation of privacy, or alternatively, b) the de minimis nature of any such intrusion should the court determine one exists, it must be concluded that the police activity complained of by respondent passes constitutional muster.

DATED: August 8, 1985.

Respectfully submitted,

CHRISTOPHER N. HEARD,
Legal Director

By



CHRISTOPHER N. HEARD

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

CERTIFICATE OF SERVICE BY MAIL

PEOPLE OF THE STATE)
OF CALIFORNIA,)
)
Petitioner,)
)
v.)
)
DANTE CARLO CIRAULO,)
)
Respondent.)
_____)

No. _____

State of California)
)
City and County of Sacramento)

CHRISTOPHER N. HEARD, a member of
the Bar of the Supreme Court of the
United States, being duly sworn, deposes
and states:

His business address is 660 "J"
Street, Suite 280, in the City and
County of Sacramento, State of Califor-
nia; that on August 8, 1985, true copies
of the enclosed Brief of Amicus Curiae
in the above-entitled matter were served

on counsel of record by placing same in
envelopes addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
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Said envelopes were then sealed and
deposited in the United States mail at
Sacramento, California, with first class
postage thereon fully prepaid.

CW Heard
CHRISTOPHER N. HEARD

Legal Director
Criminal Justice Legal Foundation

Dated: August 8, 1985.



Kimberly M. Scott
(NOTARY PUBLIC)

Notary Public in and for the State of
California, City and County of Sacra-
mento, personally appeared CHRISTOPHER
N. HEARD, known to me to be the person
whose name is subscribed to the within
instrument, and acknowledged that he
executed the same.

AUG 8 1985

JOSEPH E. SPANIOLO, JR.
CLERK

No. 84-1513

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
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On Writ of Certiorari to the California Court of Appeal,
First Appellate District

**BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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August 8, 1985

QUESTIONS PRESENTED

1. Whether police flying in aircraft at altitudes of at least 1,000 feet who observe unsheltered backyard fields and gardens appearing in the landscape below are engaged in searches of homes within the meaning of the Fourth Amendment to the Constitution.

2. Whether an unsheltered backyard plot, devoted to the cultivation of eight- to ten-foot cannabis plants for commercial sale, should be treated as an extension of the home within the meaning of the Fourth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. POLICE MAY LOOK DOWN FROM AN AIR- CRAFT UPON BACKYARD CROP FIELDS WITHOUT PERFORMING A "SEARCH" UN- DER THE FOURTH AMENDMENT	5
II. RESPONDENT'S CANNABIS PLOT FAILS TO QUALIFY FOR FOURTH AMENDMENT PROTECTION UNDER <i>KATZ v. UNITED</i> <i>STATES</i>	9
III. RESPONDENT'S CANNABIS PLOT IS NOT GENUINE "CURTILAGE" AND DOES NOT FALL WITHIN THE ZONE OF FOURTH AMENDMENT PROTECTION RESERVED FOR FAMILY PURPOSES AND DOMESTIC ACTIVITIES	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
<i>Booker v. Jarrett</i> , 78 S.E. 754, 72 W.Va. 606 (1913)	12, 13
<i>Boyd v. United States</i> , 116 U.S. 616 (1886)	14
<i>Coddington v. Hudson County Dry Dock & Wet Dock Co.</i> , 31 N.J.L. 47 (1863)	12
<i>Craven v. State</i> , 111 So. 767, 22 Ala. App. 39 (1927)	13
<i>De Mouy v. Jepson</i> , 51 So. 2d 506, 255 Ala. 337 (1951)	13
<i>Dean v. Superior Court of Nevada County</i> , 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (3d Dist. 1973) ..	6, 14
<i>Dow Chemical v. United States</i> , 749 F.2d 307 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3869 (U.S. June 11, 1985) (No. 84-1259)	9, 10, 11, 15
<i>Jones v. Commonwealth</i> , 38 S.W. 2d 971, 239 Ky. 110 (1931)	13
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	3, 9
<i>Littke v. State</i> , 258 P.2d 211, 97 Okl. Cr. 78 (Crim. Ct. App. 1953)	13
<i>Oliver v. United States</i> , 104 S. Ct. 1735 (1984)	passim
<i>People v. Lashmett</i> , 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E. 2d 888 (1979), cert. denied, 444 U.S. 1081 (1980)	6
<i>People v. Taylor</i> , 2 Mich. 250 (1851)	13
<i>Randall v. Florida</i> , 458 So. 2d 822 (Fla. Dist. Ct. App. 1984)	4, 5, 6, 7
<i>State of Hawaii v. Stachler</i> , 570 P.2d 1323 (Sup. Ct. Haw. 1977)	4, 7, 10, 12
<i>United States v. Allen</i> , 675 F.2d 1373 (9th Cir. 1980)	4, 6, 10
<i>United States v. Arms</i> , 270 F. Supp. 126 (E.D. Tenn., 1967)	13
<i>United States v. DeBacker</i> , 493 F. Supp. 1078, 56 A.L.R. Fed. 765 (W.D. Mich. 1980)	6
<i>United States v. Van Dyke</i> , 643 F.2d 992 (4th Cir. 1981)	14
<i>Constitution</i>	
U.S. Const. Amend. IV	passim

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

 No. 84-1513

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRAOLO,
Respondent.

 On Writ of Certiorari to the California Court of Appeal,
 First Appellate District

BRIEF OF AMICUS CURIAE
 THE WASHINGTON LEGAL FOUNDATION
 IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law center based in Washington, D.C., with over 80,000 members nationwide. WLF engages in litigation and administrative proceedings in matters affecting national legal policy and the basic rights of ordinary, law-abiding citizens. This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.1.

WLF devotes a substantial portion of its resources to supporting the cause of strong and effective law enforcement in cases involving criminal justice and related constitutional issues. The Foundation also maintains a "Drug Alert" Project designed to encourage and defend efforts to curb the alarming increase of illegal drug use in the United States, especially among America's youth. Among other activities, WLF provides legal assistance and counseling to parent-teacher groups, school boards and municipalities interested in curbing drug abuse. WLF also frequently participates in court cases involving the proper administration of justice as to drug issues.

The Foundation has frequently appeared before this Court as *amicus curiae* in cases dealing with criminal justice issues. See, e.g., *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983); *United States v. Ptasynski*, 103 S. Ct. 2239 (1983); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). WLF has been especially active in litigation involving the proper scope of Fourth Amendment restraints on law enforcement. For example, WLF joined 25 State Attorneys General in submitting arguments to this Court in *Illinois v. Gates*, 454 U.S. 1140 (1983), calling for a good faith exception to the exclusionary rule.

Here, WLF seeks to advance the interests of its members by demonstrating the legal invalidity of the restraints placed on anti-narcotics law enforcement personnel by the California tribunal below. Nothing in the Constitution forbids state law enforcement personnel from making the same observations of a backyard field that could be made by an ordinary citizen without committing a trespass. In particular, WLF would urge the Court to recognize that the outdoor cultivation of illegal drugs—now one of the leading sources of income for the deadly illegal drug business—entails none of the legitimate privacy interests which alone command the Fourth Amendment's protection.

WLF's brief will contribute to the just disposition of this case by demonstrating that respondent's claim to "vertical" privacy for commercial cannabis cultivation bears no relationship to the genuine policies and purposes of the Fourth Amendment.

STATEMENT OF THE CASE

In the interest of brevity and judicial economy, the *amicus curiae* adopts the statement of the case set forth in the brief of petitioner, the State of California.

SUMMARY OF ARGUMENT

1. The court below erred in treating remote aerial observation of an unsheltered outdoor cannabis plot as a "search" of the "home" within the meaning of the Fourth Amendment. Airborne police do not need a warrant to observe the same features of the landscape that can be freely seen by thousands of airline passengers and aviators every day. To hold otherwise would impose anomalous and unwarranted handicaps on law enforcement personnel, forcing them to revert to 19th century detection methods in their efforts to combat modern, "hi-tech" drug operations. Absent low-altitude hovering or "buzzing" maneuvers, police aerial observation of unsheltered and conspicuous outdoor foliage simply does not implicate Fourth Amendment concerns.

2. The lower court misapplied the "reasonable expectation of privacy" formula of *Katz v. United States*. First, there was nothing to show that the defendant had even an *actual* expectation of privacy from *aerial* observation (as opposed to ground level observation) with respect to his cannabis crop. In any event, it could not have been a *reasonable* expectation; the volume and variety of contemporary air traffic is such that unsheltered outdoor lots are obviously subject to at least remote viewing by thousands of air passengers and aviators. And from the perspective of the airborne viewer, there is no

genuine distinction between land adjacent to a residence and other land. Further, even if there could be a reasonable privacy expectation as to a normal family backyard, such expectations are fatally undercut when the homeowner commits his backyard to commercial cannabis cultivation.

3. The Court of Appeal erred in its rigid, mechanical application of the curtilage exception to the "open fields" doctrine of *Oliver v. United States*. Defendant's backyard cannabis field is not properly treated as curtilage, because it was not "habitually devoted" to family purposes and private domestic pursuits. The illegal commercial cultivation of cannabis is hardly the kind of private domestic activity which the curtilage concept was devised to protect.

ARGUMENT

This case presents the question of whether police aerial observation of outdoor cannabis plots violates the Fourth Amendment whenever those plots are adjacent to a residence.

As long as such observations are made from aircraft flying at reasonable altitudes, and not otherwise "buzzing" or intruding upon the peace of the residence, no "search" is implicated under the Fourth Amendment. When a policeman makes an "open view" observation that any civilian could make just as easily by legally flying over in a Piper Cub or glider, he is not "searching" a home but simply looking over the landscape. Other courts considering the question have so held. *E.g.*, *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980); *Randall v. Florida*, 458 So.2d 822 (Fla. Dist. Ct. App. 1984); *State of Hawaii v. Stachler*, 570 P.2d 1323 (Sup. Ct. Haw. 1977).

Moreover, an unsheltered, outdoor cannabis plot is not protected by the Fourth Amendment even if it happens

to be located near a residence. Outdoor plots devoted to commercial crop cultivation have nothing at all to do with "those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver v. United States*, 104 S. Ct. 1739, 1741 (1984). The plants grown in *this* backyard were not intended for Mother's Day bouquets or centerpieces for the family dinner table. They were a pure cash crop, grown for commercial sale. As such, the backyard in question has no claim on the special protections for family or personal privacy which the Fourth Amendment extends to the home.

I. POLICE MAY LOOK DOWN FROM AN AIRCRAFT UPON BACKYARD CROP FIELDS WITHOUT PERFORMING A "SEARCH" UNDER THE FOURTH AMENDMENT

In this case, the California Court of Appeal ruled that it was unconstitutional for a policeman to observe without a warrant what any private citizen could easily and legally see from the same vantage point: an unsheltered outdoor plot, visible from a remote aircraft with the unaided eye. Specifically, the court held that a policeman looking down at the earth's landscape, from a plane flying at an altitude of over 1,000 feet, was somehow engaged in an unreasonable search of a house, in violation of the Fourth Amendment.

The decision is manifestly wrong on all counts. The policeman was not engaged in a "search," but in a remote, preliminary observation. See *Randall v. Florida*, *supra*, 458 So.2d at 824. He was not peering into a house, or rummaging through drawers and files, but merely *noticing* a conspicuous outdoor marijuana field from an overflying fixed-wing airplane.¹ Indeed, the of-

¹ Whatever contrary rule there may be for "hovering" helicopter surveillance, the cases are clear in holding that observations made from overflying fixed-wing airplanes do not violate the Fourth

ficer did not even use binoculars or a telephoto lens to obtain an amplified view of the landscape below—even though the use of such aids in aerial surveillance has been upheld by the courts in similar cases. *E.g.*, *United States v. Allen*, *supra*, 675 F.2d at 1380-81 (intensive helicopter surveillance of ranch, using telephoto lens, upheld). In short, the officer's conduct was a reasonable and unobtrusive way to establish probable cause for a warrant authorizing an actual search of the premises.

The proper analysis of such remote, non-harassing forms of aerial surveillance was set forth by the court in *Randall v. State of Florida*, *supra*, 458 So.2d at 824. There, the police likewise executed an aerial overpass above a fenced-in, backyard marijuana patch. In *Randall*, moreover, the observation was made from a helicopter, which the courts have recognized as having far greater potential for intrusive spying than fixed-wing airplanes. Nevertheless, the Court ruled that “. . . the officers' aerial observation of appellant's fenced backyard was a legally permissible preintrusion ‘open view’.”

The *Randall* decision further demonstrates why the dweller's reasonable expectation of privacy from *ground-level* observation—as here, manifested by his erection of a surrounding fence—nonetheless “did not protect his backyard from *aerial* observation.” [emphasis added] As the Court explained (458 So.2d at 825):

The investigating officers unquestionably made their observation from a place where they had a legal right to be. They did not hover over appellant's property or survey it from an unreasonably low altitude. Nor

Amendment. *E.g.*, *Dean v. Superior Court of Nevada County*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (3d Dist. 1973) (300 ft. airplane surveillance upheld); *United States v. DeBacker*, 493 F. Supp. 1078, 56 ALR Fed. 765 (W.D. Mich. 1980) (airplane which made pass to 50 feet of field did not violate Constitution); *People v. Lashmet*, 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (1979), *cert. denied*, 444 U.S. 1081 (1980) (airplane surveillance at 2,400 feet upheld).

did they make repeated flights over the property, subjecting it to daily scrutiny over a prolonged period until they finally discovered contraband. Furthermore, the officers made their initial observation of the contraband with their unaided vision, without resort to high-powered lenses or other telescopic devices.

The Florida court's approach in *Randall*—an approach previously followed by the Supreme Court of Hawaii in *State v. Stachler*, *supra*, 570 P.2d at 1328—is sensible, legally correct, and directly on point here. The remote aerial observation made in this case was likewise a “preintrusion open view”, which simply does not implicate Fourth Amendment constraints.

Ignoring these persuasive precedents, the decision of the California court requires the police to impose on themselves a bizarre and unnatural handicap in their efforts to detect and apprehend illegal drug traffic. It effectively deprives police of a primary method of detecting sources of the drug trade—*i.e.*, thorough aerial surveillance over suspect areas—and gives the drug traders an enormous advantage which they are certain to exploit. In effect, the decision creates a “safe harbor” for illegal drug operations in any field or plot which happens to be adjacent to any building that someone calls a “residence.” And it does so on the basis of palpably false assumptions regarding the “rights” associated with outdoor drug cultivation.

The skies of America are crowded with aircraft of all varieties. On any given day, some 930,000 Americans are aloft in aircraft flying in U.S. navigable airspace.² Whether flying private aircraft or riding as commercial passengers, these citizens are completely free to observe (and to photograph) whatever appears in the landscape

² Based on statistics provided by the Air Traffic Conference of America, showing that about 343,000,000 passengers were transported in U.S. airspace in 1984.

below. Every day, hundreds of thousands of passengers look down from aircraft portholes directly into the backyards of literally millions of American households. When these indisputable facts are considered, anyone who entertains the notion that he can expect privacy from remote aerial observation for an unsheltered outdoor lot is engaged in pure self-delusion.

In this regard, it is important to distinguish the facts of this case from the genuine search and seizure situation. In the situation contemplated by the Framers, the power of the State is employed by the police to *force* or *insinuate* themselves into a private place to which they would otherwise be denied entry. The police are thus able to achieve a vantage point within the home that could not be achieved by an uninvited stranger without breaking the law. But the ability to observe an unsheltered backyard from an aircraft is in no way dependent upon the ability to invoke the power and resources of the State. It can be accomplished without breaking the law by any citizen who has access to some form of aircraft.

In this case, then, the alleged violation of Fourth Amendment privacy interests has nothing to do with that unique power of the States which the Amendment was framed to restrain.

That which lies in plain view to any airline passenger on a legal overflight cannot be made invisible to airborne police officers. The Fourth Amendment restrictions on intrusive government searching do not purport to deprive police of the use of technologies available to everyone else or of the basic perceptive capacities available to a passing citizen. And the police are not required to avert their eyes from conspicuous, outdoor evidence of criminal activity. Yet that is *precisely* the effect of the Court of Appeal's decision in actual practice. This Court should decline to embrace such a distortion of logic and plain sense as part of our Fourth Amendment jurisprudence.

II. RESPONDENT'S CANNABIS PLOT FAILS TO QUALIFY FOR FOURTH AMENDMENT PROTECTION UNDER *KATZ v. UNITED STATES*

In *Katz v. United States*, 389 U.S. 347 (1967), this Court established a two-part test for determining whether a Fourth Amendment "search" has actually occurred in a given case: (1) The person claiming protection must have an actual or subjective expectation of privacy in the area affected; and (2) that expectation must be one that society would deem reasonable.

In applying this test, it is important to recall that the *Katz* decision "did not sever Fourth Amendment doctrine from the Amendment's language," *Oliver v. United States, supra*, 104 S. Ct. at 1740 n.6. The Amendment speaks quite specifically of the "right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable *searches* and seizures" [emphasis added]. This case, on the other hand, involves a policeman observing a backyard field of towering, bright-green plants from a remote airplane flying at an altitude of at least 1,000 feet. The glaring disparity between the facts of this case and the type of search evoked by the plain language of the Fourth Amendment places the respondent's extraordinary claim of privacy expectations in proper perspective.

Under the *Katz* test, the person's expectation of privacy must extend not only to the *area* or parcel in question, but also to the particular *type of intrusion* which occurred. See *Dow Chemical v. United States*, 749 F.2d 307 (6th Cir. 1984) *cert. granted*, 53 U.S.L.W. 3869 (U.S. June 11, 1985) (No. 84-1259).

While respondent may well have entertained certain limited expectations of privacy regarding his backyard cannabis plot (i.e., as evidenced by the surrounding fence), there is no indication that they extended to the possibility of remote observation by aerial surveillance. The fences surrounding the plot reflect a privacy interest

confined to *ground level* intrusions. *Id.*, 749 F.2d at 312. To paraphrase the Sixth Circuit in the *Dow* case, respondent "did not take any precautions against aerial intrusions, even though [his lot] was near an airport," *id.* at 312.³ Thus, just as in the *Dow* case, the record here does not even support the proposition that respondent *actually* expected privacy from remote aerial observation for his cannabis field.

Even if he had, respondent's expectations would have been patently unreasonable. Just as the Supreme Court of Hawaii ruled in *State v. Stachler*, *supra*, 570 P.2d at 1328: "[W]e think that defendant . . . could have no reasonable expectation of privacy as to observation, from a reasonable height, of his open marijuana patch."

The Santa Clara vicinity where defendant resided is accustomed to regular aircraft overflights associated with the nearby San Jose city airport (CT 11-12, 15-17). This factor obviously undercuts any expectations of immunity from high altitude aerial observation. Thus, in *United States v. Allen*, *supra*, 675 F.2d at 1381, the court stressed that there is no valid expectation of vertical privacy in areas subject to regular overflight activity.

Commercial air traffic aside, the skies of a typical suburban California community are frequently populated by private Cessnas, traffic-monitoring helicopters, and even the occasional glider. Indeed, aerial surveillance for illegal drug cultivation has *itself* been a sufficiently widespread and publicized phenomenon in California to lessen expectations regarding outdoor privacy from aerial observation.

³ It would not be necessary to erect an "opaque bubble", see *United States v. Allen*, *supra*, 675 F.2d at 1380, to manifest such precautions. Awnings, canopies, and tall, leafy trees are commonly used to provide enhanced backyard privacy. The fact that one cannot grow cannabis under an awning or canopy hardly serves to rebut the point that such outdoor cultivation has only the most limited privacy expectations, if any. Outdoor commercial crop cultivation is simply not a private activity.

In contemporary America, therefore, no one can reasonably assume that an unobstructed backyard landscape is immune from the glance of those who fly overhead. And only a brief airborne glance (as opposed to a studious examination) is all that is needed for a knowledgeable narcotics officer to verify the existence of an outdoor cannabis plot.

It is of considerable significance that only the most remote and unobtrusive form of observation is necessary to detect the existence of an outdoor cannabis plot. The relative ease with which exposed cannabis fields can be identified from the air makes intrusive tactics (such as lengthy hovering by helicopter) unnecessary. Yet the respondent's theory would seem to hold that the efficacy of the observation in detecting illicit activity automatically renders it unconstitutional, no matter how remote the vantage point. The problem with that argument is that it confuses a citizen's right to be free from unreasonable intrusion with a criminal's desire to be free from effective detection.

The decision below propagates that very fallacy by losing sight of the Fourth Amendment's genuine objectives and legitimate scope. As recently stated in *Dow Chemical v. United States*, *supra*, 749 F.2d at 312, the proper test of the Amendment's applicability

. . . focuses on whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a "reasonable" expectation of privacy.

Whatever human relationships (if any) may be said to flourish in a commercial marijuana field, they have nothing to do with intimacy or trust. In fact, all that goes on there is the pursuit of profit through the cultivation of an illegal crop.

If the backyard crop observed by the Santa Clara police had been pumpkins instead of cannabis, the home-

owner's claim that no one should be able to observe his pumpkin patch from the sky would have been met with derisive laughter.⁴ The mere fact that the crop involved here happens to be an illegal drug should hardly give the owner's privacy claim any greater weight.

III. RESPONDENT'S CANNABIS PLOT IS NOT GENUINE "CURTILAGE" AND DOES NOT FALL WITHIN THE ZONE OF FOURTH AMENDMENT PROTECTION RESERVED FOR FAMILY PURPOSES AND DOMESTIC ACTIVITIES

The Court of Appeals erred further by misapplying the so-called "curtilage" exception to the "open fields" doctrine of *Oliver v. United States*, *supra*. The constitutionality of the aerial observation was made to turn on the abstruse question of whether the plot in question could meet the technical definition of curtilage. But the dispositive consideration is not whether the cannabis field fell within some anachronistic definition of the curtilage; the true question is whether the plot was a genuine extension of the home, devoted to intimate domestic activities.

The curtilage concept has its origins in ancient common law. The term originally signified the land enclosed together with the castle and its outhouses within high stone walls, where the old English barons sometimes held court in the open air. The term was later corrupted into "court yard." *Coddington v. Hudson Covnty Dry Dock & Wet Dock Co.*, 31 N.J.L. (2 Vroom) 477, 484 (1863). Curtilage eventually came to signify the lands and other buildings enclosed within the fence which generally surrounded dwelling houses in rural England. *Booker v.*

⁴ As the Hawaii Supreme Court aptly observed in *State v. Stachler*, *supra*, 570 P.2d at 1328:

If defendant had been engaged in growing taro, sweet potato or banana, surely he would not have a reasonable expectation of privacy as to his crop from aerial observation.

Jarrett, 78 S.E. 754, 755, 72 W.Va. 606 (1913); *People v. Taylor*, 2 Mich. 250, 251 (1851).

In American law, curtilage has generally been defined as that parcel of land immediately adjoining the residence and habitually used in connection with it for "family purposes" and "domestic employments." See, e.g., *United States v. Arms*, 270 F. Supp. 126, 130 (E.D. Tenn., 1967); *De Mouy v. Jepson*, 51 So.2d 506, 510, 255 Ala. 337 (1951); *Jones v. Commonwealth*, 38 S.W.2d 971, 973, 239 Ky. 110 (1931). Its most significant function as a legal classification was to define that portion of a homeowner's land within which he was not obligated to retreat in order to avoid killing an intruder. *Craven v. State*, 111 So. 767, 771, 22 Ala. App. 39 (1927).

Significantly, the courts have denied protection to areas otherwise meeting the physical definition of curtilage where they were not "used for domestic purposes in the conduct of family affairs." E.g., *Littke v. State*, 258 P.2d 211, 214, 97 Okl. Cr. 78 (Crim. Ct. App. 1953).

Some courts have openly criticized the adoption of this anachronistic and anomalous term by American law. E.g., *People v. Taylor*, *supra*, 2 Mich. at 251. Designed to reflect the usages of rural pre-industrial England, it bears little relationship to the distinct privacy and property concerns raised by such modern phenomena as aerial surveillance.

This notwithstanding, the Supreme Court did acknowledge the existence of the curtilage concept when it reaffirmed the open fields doctrine in *Oliver*. It bears emphasis, however, that the Court explicitly refrained from holding that curtilage is entitled to the same degree of Fourth Amendment protection as the home itself. 104 S. Ct. at 1742 n.11. Rather, the curtilage concept was invoked merely to demonstrate that the open fields doctrine does not obliterate all out-of-door enclaves for legitimately private activity.

Quoting from *Boyd v. United States*, 116 U.S. 616, 630 (1886), the Court described the curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" 104 S. Ct. at 1742. [emphasis added] The Court also emphasized that the scope of the curtilage doctrine is defined

. . . by reference to the factors that determine whether an individual reasonably may expect that an area adjacent to the home will remain private. [104 S. Ct. at 1742]

The pertinent point emphasized in *Oliver* is that only areas devoted to private, domestic activities may be treated as extensions of the home under the curtilage exception to the open fields doctrine. The outdoor cultivation of tree-tall,⁵ illegal drug plants hardly fits that prescription.

In the instant case, the court ignored the pivotal factors stressed in *Oliver* in favor of a rigid application of the purely physical characteristics of the curtilage (Cert. Pet., App. A, pp. 10-11; 17). Instead of considering whether land used to grow an illegal cannabis crop was validly associated with "intimate family activities," deserving of privacy, the court merely noted that it was located in a back yard and surrounded by fences. (*Id.* at 17).

As made clear by the Court in *United States v. Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981), holding that a given plot of land lies within the strictly physical definition of the curtilage only begins the Fourth Amendment inquiry. The key question relates to "its use and enjoyment as an adjunct to the domestic economy of the family," *id.*, and whether there is a legitimate and genuine expectation of privacy respecting the particular land in

⁵ Cannabis plants commonly grow to between fifteen and twenty feet in height. See, e.g., *Dean v. Superior Court of Nevada County*, *supra*.

question or the objects within it. While a backyard containing 100-foot pine trees (or a 100-foot radio antenna) may squarely conform to the definition of curtilage, no one would seriously contend that the conspicuous objects towering above the yard are protected from police scrutiny by the Fourth Amendment. The same reasoning applies to the cannabis plants at issue here.

A cannabis field is easily recognizable as such from well over 1,000 feet in the air, by its distinctive color and plant configuration (Cert. Pet. pp 5-6; CT 12-16, 38). The plants commonly tower from ten to twenty feet in height, and higher. In all, it is a highly conspicuous commercial crop, the cultivation of which is plainly incompatible with accepted notions of private family activity.

Moreover, the purely commercial objectives of cannabis cultivation are themselves sufficient to disqualify these marijuana gardens from protection as part of the domestic curtilage. As the Court stressed in the *Dow Chemical* case, *supra*, 749 F.2d at 314, "After a diligent search we have found no cases applying the curtilage concept to the commercial setting." And the "backyard" at issue here had clearly been converted to a commercial setting.

While the court below failed to examine the cannabis field in relation to the proper legal criteria, the Supreme Court's analysis in *Oliver* did apply those criteria in language that is directly pertinent here (104 S. Ct. at 1741):

In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. *There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.* Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. [emphasis added]

The above statement from *Oliver* holds true in *every respect* in this case as well. Outdoor marijuana fields obviously do not provide the setting for "intimate" family activities. Conversely, the backyard lot involved here was indeed used for "the cultivation of crops"—and illegal crops at that! Further, there is surely no "societal interest" in providing a zone of privacy for cannabis cultivation. And finally, the area in question here was also "accessible" to aerial observation by the general public as a consequence of its proximity to a nearby airport.

These are the critical factors established by the Supreme Court for determining whether a particular parcel of land is within the zone of Fourth Amendment protection. Because outdoor plots devoted to cash-crop cultivation fall short on each one of those factors, the remote aerial observation of such plots raises no Fourth Amendment problem whatsoever.

CONCLUSION

To hold that remote aerial observation of outdoor commercial cannabis plots constitutes a Fourth Amendment "search" is to distort the meaning of the Constitution beyond all recognition. Moreover, such a holding would result in anomalous and wholly unwarranted restrictions on police programs to detect illegal drug operations. The decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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No. 84-1513

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Supreme Court, U.S.

FILED

AUG 12 1985

JOSEPH F. SPANIOLO, JR.

IN THE

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ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEALS,
FIRST APPELLATE DISTRICT

BRIEF OF THE STATE OF INDIANA AND THE
COMMONWEALTHS AND STATES OF
ALABAMA, DELAWARE, GEORGIA, ILLINOIS,
KANSAS, KENTUCKY, LOUISIANA, MAINE,
MASSACHUSETTS, MISSOURI, NEBRASKA,
NEVADA, NEW HAMPSHIRE, NEW MEXICO,
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TABLE OF CONTENTS

	<i>Page:</i>
Table of Authorities.....	ii
Interest of the Amici Curiae.....	1
Statement of the Case.....	2
Summary of the Argument.....	3
Argument.....	3
Conclusion.....	7

TABLE OF AUTHORITIES

Cases:	Page:
<i>Bell v. Wolfish</i> , 441 U.S. 520, 99 S.Ct. 1861 (1979) ..	6
<i>Dean v. Superior Court</i> , 35 Cal. App.3d 112, 110 Cal. Rptr. 585 (1973)	5, 6
<i>Delaware v. Prouse</i> , 440 U.S. 648, 99 S.Ct. 1391 (1979)	2
<i>Dow Chemical Co. v. United States</i> , 536 F.Supp. 1355 (E.D. Mich. 1982), cert. granted, ____ U.S. ____ (June 10, 1985).....	5
<i>Hester v. United States</i> , 265 U.S. 57, 44 S.Ct. 445 (1924)	3
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507 (1967).....	3, 4, 6
<i>People v. Sneed</i> , 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (1973)	5
<i>People v. St. Amour</i> , 104 Cal. App.3d 886, 163 Cal. Rptr. 187 (1980)	5
<i>State v. Knight</i> , 63 Hawaii 90, 621 P.2d 370 (1980) ..	5
<i>State v. Layne</i> , 623 S.W.2d 629 (Tenn. Cr. App. 1981)	5
<i>State v. Stachler</i> , 58 Hawaii 412, 570 P.2d 1323 (1977)	5
<i>United States v. Allen</i> , 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981)	4, 5
<i>United States v. Bassford</i> , 601 F.Supp. 1324 (D. Maine 1985)	5
<i>United States v. DeBacker</i> , 493 F.Supp. 1078 (W.D. Mich. 1980)	4, 5
<i>United States v. Knotts</i> , 460 U.S. 276, 103 S.Ct. 1081 (1982)	5
<i>United States v. Lace</i> , 669 F.2d 46 (2d Cir. 1982) ...	6

<i>United States v. Mullinex</i> , 508 F.Supp. 512 (E.D. Ky. 1980)	5
<i>United States v. Oliver</i> , ____ U.S. ____, 104 S.Ct. 1735 (1984)	3, 4
<i>Zurcher v. Stanford Daily</i> , 436 U.S. 547, 98 S.Ct. 1970 (1978)	2

No. 84-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner

v.

DANTE CARLO CIRAULO,
Respondent.

**ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEALS,
FIRST APPELLATE DISTRICT**

INTEREST OF AMICI CURIAE

Aerial surveillance is an important and effective tool of law enforcement in curtailing the cultivation and distribution of marijuana.¹ Statistics on the cultivation of marijuana underscore the interest of the amici curiae in

¹ DeFoor, Houston Police Department's Eye in the Sky, FBI L. Enforcement Bull., Sept. 1981 at 1, 2.

this area. Marijuana is the fourth largest cash crop in the United States following corn, soybeans, and wheat.² In 1981, the marijuana crop had a street value of 8.5 billion dollars.³ Further, law enforcement agencies in the 50 states destroyed 3,802,927 cultivated marijuana plants, as well as, 9,178,283 wild marijuana plants in 1984.⁴

The success and repeated use of aerial surveillance as a police investigatory tool has created a new area of fourth amendment search and seizure analysis. The judicial system presently condones the use of warrantless aerial surveillance.⁵ In deciding whether warrantless aerial surveillance constitutes a search under the fourth amendment, courts recognize that the fourth amendment requires that a balance be achieved between an individual's privacy interests and the general public's interest in law enforcement. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970 (1978). These cases recognize that an expectation of privacy is not reasonable merely because it is manifested objectively by means of active concealment. The expectation must be one that society is prepared to recognize as reasonable.

Thus, the amici curiae submit that in analyzing the propriety of warrantless aerial surveillance, the focus should be on both the observer and the observed: whether an accused actually expected privacy from the air; whether the surveillance method utilized was acceptable. The application of this standard to resolve warrantless

² Grass was Never Greener, Time, Aug. 9, 1982, at 15.

³ *Id.*, see also The Marijuana Wars, Newsweek, Aug. 29, 1983 at 22 (estimates of the size of the American marijuana crop).

⁴ U.S. Dept. of Justice Drug Enforcement Administration, Final Report, 1984, Domestic Cannabis Eradication/Suppression Program, Dec. 1984.

⁵ See, e.g., *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981).

aerial surveillance cases strikes a balance between the preservation of constitutionally guaranteed privacy and legitimate law enforcement techniques.

STATEMENT OF THE CASE

On September 2, 1982, a narcotics officer was informed, by means of an anonymous telephone message, that marijuana was growing in the backyard of the Respondent's residence. The plot of marijuana, which measured 15 x 25 feet and contained plants eight to ten feet in height, was enclosed in an inner ten foot fence, as well as, an outer six foot fence.

Subsequently, the officer chartered an airplane to view and to photograph the Respondent's property. At an altitude of not less than 1000 feet and without visual aids, the officer identified marijuana on the Respondent's property. Based upon the information gathered from the informant and from the sightings in the plane, the officer obtained a search warrant to search the Respondent's property. Thereafter, the warrant was executed. Seventy-three marijuana plants were seized from the Respondent's yard.

SUMMARY OF THE ARGUMENT

To determine whether a search has occurred in a warrantless aerial surveillance case, a standard of reasonableness should be adopted—a standard which properly focuses on both the observer and the observed.

ARGUMENT

In *United States v. Oliver*,⁶ ___ U.S. ___, 104 S.Ct. 1735 (1984), the Supreme Court revitalized the "open fields"

⁶ In *Oliver*, two police officers acting on tips that marijuana was growing on a farm, walked toward the suspect field passed a locked gate with a "no trespassing" sign, ignored verbal warnings, and found marijuana plants.

doctrine set forth in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445 (1924). This doctrine permits police officers, without a warrant, to enter and search an open field which is not within the curtilage of a defendant's home. In a section of the opinion, the "open fields" rule was discussed in light of the "reasonable expectation of privacy" test established in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967). The Court reaffirmed that the fourth amendment "does not protect the merely subjective expectations that society is prepared to recognize as reasonable." ____ U.S. at ____, 104 S.Ct. at 1740, quoting *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). The Court further stated that the rule in *Hester* "may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." ____ U.S. at ____, 104 S.Ct. at 1741. *Oliver*, however, did not delineate the scope of the curtilage exception to the "open fields" doctrine nor did it address the propriety of aerial surveillance of areas within or near the curtilage but open to view from the air.

The *Oliver* Court, however, citing Ninth Circuit and other lower court precedent noted that the "public and police lawfully may survey lands from the air." ____ U.S. at ____, 104 S.Ct. at 1741, citing in n. 9, *United States v. Allen*,⁷ 675 F.2d 1373, 1380-1381 (9th Cir. 1980), *cert. denied*, 454

⁷ In *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981) the Court ruled that under the facts of that case overflights did not constitute an unreasonable intrusion upon the Defendants' reasonable expectations of privacy. The Court relied principally upon the unique characteristics of the area observed. Coast Guard helicopters, the Court noted, "routinely traversed the nearby air space for several reasons, including law enforcement." *Id.* at 1381. Further, under those facts "any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well known function of sea-coast patrol and surveillance, could expect that government officers conducting such flights would be aided by sense-enhancing devices." *Id.*

U.S. 833 (1981); *United States v. DeBacker*, 493 F.Supp. 1078, 1081 (W.D.Mich. 1980). It is well, then, to resolve the issue whether of warrantless aerial surveillance of an area within or near the curtilage constitutes a search in light of *Katz*.

Katz established the reasonable expectation of privacy as the touchstone of fourth amendment analysis. The *Katz* decision has generally been understood in terms of Justice Harlan's two prong test for protected expectations of privacy: (1) "that a person have exhibited an actual (subjective) expectation of privacy" and (2) "that the expectation be one that society is prepared to recognize as 'reasonable'." Such analysis invites a careful examination of the totality of the circumstances to determine whether the person whose place is searched has manifested an expectation of privacy that society is prepared to recognize as reasonable.

The amici curiae submit that this fourth amendment question must be examined by assessing the nature of the particular aerial surveillance and the likely extent of its impact on an individual's sense of security, balanced against the utility of the conduct as a technique of law enforcement. The optimum approach, then, is to focus on the observer and the observed: (1) whether the accused actually expected privacy from the air; (2) whether the surveillance method utilized was acceptable.⁸ A justifiable

⁸ This formulation incorporates the "reasonable expectations" test yet still focuses on appropriate policy considerations. In *Dow Chemical Co. v. United States*, 536 F.Supp. 1355 (E.D. Mich. 1982), *cert. granted*, ____ U.S. ____ (June 10, 1985), the court incorporated social concepts into the "reasonable expectations" test. The *Dow* court observed that the "essence of the first prong of the test is that the party must have acted in such a way that it would have been reasonable for him to expect that he would not be observed Therefore, the court must look to objective manifestations of any claimed privacy expectation." *Id.* at 1364. In determining whether an expectation is one society will accept as reasonable, the *Dow* court reversed the question by examining the reasonableness of the government's actions.

expectation of privacy from airborne observation can be determined by considering: (1) the obviousness of the object from the air;⁹ (2) the location of the property observed;¹⁰ and (3) the frequency of air traffic over the property.¹¹

If a subjective expectation of privacy has been established, the focus of the inquiry should shift to the nature of the investigatory techniques utilized by the police. Factors such as the altitude of surveillance, the use of technological viewing aids in the observation, and finally, the frequency and duration of aerial surveillance should be considered.¹² This qualified "open view"¹³ approach strikes a satisfactory balance between the use of

⁹ *Dean v. Superior Court*, 35 Cal. App.3d 112, 110 Cal. Rptr. 585 (1973); *People v. St. Amour*, 104 Cal. App.3d 886, 163 Cal. Rptr. 187 (1980); *State v. Stachler*, 58 Hawaii 412, 570 P.2d 1323 (1977).

¹⁰ *People v. Sneed*, 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (1973).

¹¹ *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981); *United States v. Mullinex*, 508 F.Supp. 512 (E.D.Ky. 1980); *United States v. DeBacker*, 493 F.Supp. 1078 (W.D.Mich. 1980); *State v. Layne*, 623 S.W.2d 629 (Tenn. Cr. App. 1981).

¹² See, e.g., *People v. Sneed*, 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (1973) (warrantless aerial surveillance at 20-25 feet is unconstitutional); *State v. Stachler*, 58 Hawaii 412, 570 P.2d 1323 (1977) (warrantless visual surveillance unconstitutional when highpowered binoculars used); *State v. Knight*, 63 Hawaii 90, 621 P.2d 370 (1980) (continual aerial surveillance for prolonged time periods could be a consideration although not relevant to instant case. However, devices such as highpowered binoculars, telescopic cameras, and infra-red telescopes only enhance what could be seen with the naked eye and, therefore, their use has been held not to constitute a fourth amendment search. *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1982); see also *United States v. Bassford*, 601 F.Supp. 1324 (D.Maine 1985).

¹³ The notion of "open view" originated in *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 521 (1967) (Harlan, J., concurring). Justice Harlan explained that something exposed to the open view of a member of the public is not protected under the fourth amendment because no intention to keep it private has been exhibited. See *United States v. Lace*, 669 F.2d 46, 50 (2d Cir. 1982).

an effective investigatory tool and the preservation of constitutionally guaranteed privacy. If a defendant has established an expectation of privacy, the reasonableness of the warrantless observations should be considered.

The public and police may lawfully survey lands from the air. During aerial surveillances, police are in a place where they have a right to be. Merely because contraband is planted in an area not observable from ground level should not foreclose all surveillance of the area.¹⁴ Indeed, aerial surveillance is a viable and reasonable technique which causes minimal intrusion yet allows police to corroborate informants' tips as a means of establishing sufficient probable cause to obtain a search warrant. In *Dean v. Superior Court*, 35 Cal. App.3d 112, 117, 110 Cal. Rptr. 585 (1973), the court noted that agriculturists do not conceal their wheat or oat fields from aerial view. Marijuana fields/plots deserve no greater protection. To determine whether a search has occurred in a warrantless aerial surveillance case, a standard of reasonableness should be adopted—a standard which properly focuses on both the observer and the observed. The advantage to the use of this approach is that by examining the conduct of police, a court is forced to consider the effect such conduct has upon society's "sense of security." In this way, citizens will be allowed to be both protected by and from airborne observation.

¹⁴ In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), the Court ruled that, in some cases, expectations of privacy may be unreasonable if society is not prepared to recognize them as legitimate—regardless of the efforts of the person to keep his activity hidden.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeals, First Appellate District should be reversed.

Respectfully submitted,

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(10)
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On Writ Of Certiorari To The California
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**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT:	
I. THE USE BY POLICE OF WARRANTLESS AERIAL SURVEILLANCE TO VIEW AND PHOTOGRAPH RE- SPONDENT'S FENCED, PRIVATE BACKYARD CON- STITUTED A SEARCH	2
A. Respondent Exhibited A Subjective Expecta- tion Of Privacy	4
B. Respondent's Actual Expectation Of Privacy Is One That Society Is Prepared To Recognize As Reasonable	8
II. THE WARRANTLESS SEARCH OF RESPONDENT'S BACKYARD VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION	11
CONCLUSION.....	14

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).....	12
<i>Dean v. Superior Court</i> , 35 Cal.App.3d 112, 110 Cal. Rptr. 585 (1973)	10
<i>Delaware v. Prouse</i> , 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979)	11
<i>Entick v. Carrington</i> , 19 How.St.Tr. 1029 (1765).....	3
<i>Estate of Thomas A. Wilson v. Aiken Industries, Inc.</i> , 439 U.S. 877, 58 L.Ed.2d 191, 99 S.Ct. 366 (1978)	14
<i>Illinois v. Andreas</i> , 463 U.S. —, 77 L.Ed.2d 1003, 103 S.Ct. 3313 (1983)	3
<i>Katz v. United States</i> , 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).....	3, 4, 7
<i>Lo-Ji Sales, Inc. v. New York</i> , 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979).....	6
<i>Marshall v. Barlow's Inc.</i> , 436 U.S. 307, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978)	6
<i>New Jersey v. T.L.O.</i> , 469 U.S. —, 83 L.Ed.2d 720, 105 S.Ct. 733 (1985)	11
<i>Oliver v. United States</i> , 466 U.S. —, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984)	3, 9, 13
<i>Olmstead v. United States</i> , 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1928)	14
<i>Payton v. New York</i> , 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980).....	11-12
<i>Smith v. Maryland</i> , 442 U.S. 735, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979)	3
<i>United States v. Allen</i> , 633 F.2d 1282 (9th Cir. 1980), cert denied, 445 U.S. 833 (1981).....	5, 8
<i>United States v. Jacobsen</i> , 466 U.S. —, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984)	3, 6, 8, 12, 13
<i>United States v. Jeffers</i> , 342 U.S. 48, 96 L.Ed. 59, 72 S.Ct. 93 (1951)	6
<i>United States v. Karo</i> , 468 U.S. —, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984).....	3, 7
<i>United States v. Kim</i> , 415 F.Supp. 1252 (D.Haw. 1976).....	6, 8, 13

Table of Authorities Continued

	Page
<i>United States v. Knotts</i> , 460 U.S. 276, 75 L.Ed.2d 55, 103 S.Ct. 1081 (1983)	3
<i>United States v. Montoya de Hernandez</i> , — U.S. —, — L.Ed.2d —, 105 S.Ct. 3304 (1985)	11
<i>United States v. Place</i> , 462 U.S. —, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983).....	12, 13
<i>United States v. Taborda</i> , 635 F.2d 131 (2d Cir. 1980)...	8
<i>Walter v. United States</i> , 447 U.S. 649, 65 L.Ed.2d 410, 100 S.Ct. 2395 (1980).....	8
TEXT:	
Adams, <i>The Book Of Abigail And John: Selected Letters Of The Adams Family</i> , 1762-1784, Letter to John Adams, November 27, 1775	11
Dickens, C., <i>Oliver Twist</i> (1912)	14
Hodges, <i>Electronic Visual Surveillance And The Fourth Amendment: The Arrival Of Big Brother</i> , 3 Hastings Const. L.Q. 261 (1976).....	9
Orwell, G., 1984 (1949)	8
Tell, <i>Suits Sight Spies in Sky</i> , National L.J., December 15, 1980 at 1, Col. 1, 28, Cols. 2-3	10

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To The California Court of Appeal
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**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia, non-profit corporation, with membership comprised of more than 4,000 lawyers, including representatives of every state. *Amicus* was founded 28 years ago to promote study and research in the field of Criminal Defense Law, to disseminate and

advance the knowledge of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of the defense lawyer. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights by the improvement of the criminal law, its practices and procedures.

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case and facts set forth in the brief of respondent.

SUMMARY OF ARGUMENT

This case presents the question of whether a person who conceals his backyard from public view at ground level has shown a reasonable expectation of privacy that police will not observe his home from the sky.

New technology has afforded the police access to and permanent recordation of private places and activities that are not otherwise observable from the ground. The police cannot be permitted to force society to retreat into an opaque bubble in order to retain any reasonable expectation of privacy. Nor may the police be allowed to circumvent legitimate privacy interests merely because this advancing technology allows them to see into places they could not otherwise constitutionally invade absent a warrant.

ARGUMENT

I.

THE USE BY POLICE OF WARRANTLESS AERIAL SURVEILLANCE TO VIEW AND PHOTOGRAPH RESPONDENT'S FENCED, PRIVATE BACKYARD CONSTITUTED A SEARCH.

A search occurs when an expectation of privacy that society is prepared to consider as reasonable is infringed.

United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 539, 104 S.Ct. 3296, 3302 (1984); *United States v. Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 94, 104 S.Ct. 1652, 1656 (1984); *Illinois v. Andreas*, 463 U.S. ___, 77 L.Ed.2d 1003, 103 S.Ct. 3313 (1983); *United States v. Knotts*, 460 U.S. 276, 75 L.Ed.2d 55, 103 S.Ct. 1081 (1983); *Smith v. Maryland*, 442 U.S. 735, 739-41, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).

The test for determining when official conduct constitutes a search

... embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. (citations omitted)—whether ... the individual has shown that “he seeks to preserve [something] as private.” (citation omitted). The second question is whether the individual’s subjective expectation of privacy is “one that society is prepared to recognize as reasonable.” (citation omitted)—whether ... the individual’s expectation, viewed objectively, is “justifiable” under the circumstances. (citation omitted).

Smith v. Maryland, 442 U.S. 735, 746, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).¹

¹ Petitioner and several *amici*, following the English common law adage that the eye cannot commit a search, *Entick v. Carrington*, 19 How.St.Tr. 1029, 1066 (1765), argue that the Fourth Amendment precludes only warrantless *physical* entries by the police into areas that are expectedly private. Since this Court’s decision in *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), Fourth Amendment analysis no longer requires a trespass. See also *United States v. Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296, 3302 (1984) (a physical trespass “is only marginally relevant to the question of whether the Fourth Amendment has been violated”); *Oliver v. United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984); *United States v. Knotts*, 460 U.S. 276, 280, 75 L.Ed.2d 55, 103 S.Ct. 1081 (1983).

A. Respondent Exhibited A Subjective Expectation Of Privacy.

Respondent did all that could reasonably be expected for him to do in order to exhibit a subjective expectation of privacy by fencing his yard and concealing his activities from the police and public. (J.A. 11).² The only other precaution that he might have taken would have been to enclose his property in an opaque bubble. Such a measure is neither aesthetically desirable nor is it constitutionally mandated.

In its brief, petitioner concedes that respondent had an actual expectation of privacy which could not have been lawfully breached by the police by jumping the fence, or by using conventional technology such as a ladder. (Pet. Br. at 13, 20-21). The fact that the government used 20th century technology, such as an airplane and a camera, to pierce respondent's privacy should be of no constitutional relevance. Even though the police resorted to this less earthly technology to avoid a physical trespass and circumvent the security of respondent's fence, they still intentionally breached respondent's actual expectation of privacy. See *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507, (1967).

Despite its concession that respondent had an actual expectation of privacy, petitioner suggests that he should be denied this actual expectation merely because of the proximity of his house to a commercial airport. The record is totally devoid, however, of evidence that any other aircraft had ever flown over respondent's house at any

² The designation "J.A." refers to the Joint Appendix. "Pet. Br." refers to Petitioner's Brief.

altitude,³ and certainly not as low as 1,000 feet. No facts in this record can be claimed to have reduced respondent's expectation of privacy which would not apply with equal force to every resident of a suburban or urban area in this country. Petitioner's and *amicus curiae's* reliance on *United States v. Ailen*, 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, 445 U.S. 833 (1981), is therefore, inapposite.

In *Allen*, the Court of Appeals found that the following specific factors diminished Allen's expectation of privacy in his ranch from aerial surveillance:

1. the ranch was virtually on the United States seacoast border;
2. the coast guard helicopters routinely traversed the nearby air space for several reasons, including law enforcement;
3. the residents would, no doubt, have been aware of these routine flights;
4. any reasonable person cognizant of the ranch's proximity to the coastline and the coast guard's well known function of seacoast patrol and surveillance, could expect that government officers conducting such flights would be aided by sophisticated electronic equipment; and
5. such residents could not reasonably bear a subjective expectation of privacy from the coast guard's airborne telephotographic scrutiny—particularly where objects observed were large scale modifications of the landscape and a barn.

633 F.2d at 1290. Consequently, there is no basis in the record, as petitioner claims, to charge respondent with

³ The officers flew to twelve locations taking pictures and looking for marijuana. There is no evidence in the record that respondent's house was in a flight line with the San Jose Airport. (J.A. 38).

knowledge of airborne law enforcement activity, routine or otherwise, and particularly not with knowledge of police use of photographic equipment.⁴

The fact that citizens are cognizant of commercial, or private aircraft flying in the navigable airspace in the general vicinity of their homes simply cannot mean that a citizen has lost or waived the reasonable expectation that he will not be the subject of governmental scrutiny by officers manning low flying aircraft. The vice here is that the government engaged in this intrusion.

The Fourth Amendment was designed specifically to protect the public from governmental intrusion. *See United States v. Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984). The fact that a private citizen has intruded, or may intrude, into some protected place does not entitle the police to do the same. "The fact that Peeping Toms abound does not license the government to follow suit." *United States v. Kim*, 415 F.Supp 1252, 1256 (D.Haw. 1976).

This Court, in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979) (per curiam), rejected the state's contention that an adult book store had no legitimate expectation of privacy against governmental intrusion because it displayed the arguably obscene items in areas of the store open to the public.⁵

⁴The record does not reveal what power lens was used on the .35mm camera.

⁵*See also Marshall v. Barlow's Inc.*, 436 U.S. 307, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978) (a warrant or its equivalent was required by the Fourth Amendment before OSHA inspectors could inspect the business premises of an unregulated industry even though employees were free to report violations to the government). *Cf. United States v. Jeffers*, 342 U.S. 48, 51, 96 L.Ed.59, 72 S.Ct. 93 (1951) (a maid, janitor or repairman may enter a hotel room, but the police without a warrant may not).

The Court stated:

there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. (citation omitted).

442 U.S. at 329. There is no evidence in the record that the police simply paralleled the actions of the general aviation public, or that they saw respondent's curtilage as a member of the aviation public might have seen it.

Government officials do not gain any constitutional entitlement to intrude upon an individual's privacy merely because a neighbor might observe a private yard and might reveal his observations to the police. Similarly, the warrantless invasion of respondent's privacy cannot be justified simply because commercial air travelers or repairmen on telephone poles might have discovered the marijuana garden, but did not. *Amicus curiae's* speculation as to what a repairman may or may not have been able to observe is of no constitutional relevance. *See United States v. Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984). As stated by Justice White in *Karo*, "[t]here would be nothing left of the Fourth Amendment right to privacy if anything that a *hypothetical* government informant *might* reveal is stripped of constitutional protection." 468 U.S. ___, 82 L.Ed.2d at 542 n.4, 104 S.Ct. at 3304 n.4.

Under [this] view it could easily be said that in *Katz v. United States*, 389 U.S. 347 (1967), Katz had no reasonable expectation of privacy because the person to whom he was speaking might have divulged the contents of the conversation.

Id. Nor did Katz give up his expectation of privacy because, hypothetically, someone might have been able to read his lips through the glass doors of the telephone

booth. A partial invasion of privacy cannot automatically justify a total invasion. *United States v. Jacobsen*, 466 U.S. —, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984); *Walter v. United States*, 447 U.S. 649, 659, n.13, 65 L.Ed.2d 410, 100 S.Ct. 2395 (1980).

The essence of petitioner's argument is that short of erecting an opaque bubble, no citizen can have an actual expectation of privacy because he knows that the government has the technological ability to surveil and photograph his home from above. The danger in adopting this Orwellian proposition⁶ was keenly stated by Judge KeARSE in *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir. 1980):

[I]t would be possible for the government by edict or by known systematic practice to condition the expectations of the populace in such a way that no one would have any real hope of privacy. *See* Orwell, 1984 (1949); *United States v. Kim*, 415 F.Supp at 1256-57; Amsterdam, *supra* at 384.

As of yet, "a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy." *United States v. Allen*, 633 F.2d at 1289.

B. Respondent's Actual Expectation Of Privacy Is One That Society Is Prepared To Recognize As Reasonable.

For a society to remain free, it must be reasonable for a citizen to expect that the police will not use technology to

⁶ "Big Brother is Watching You . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue—bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into peoples windows. The patrols did not matter, however. Only the Thought Police mattered." Orwell, 1984, p. 6 (1949).

peer into private areas solely because they are open to the sky.

Granted, a citizen cannot expect privacy everywhere. *See Oliver v. United States*, 466 U.S. —, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). The logical extension of petitioner's view, however, will require this Court to hold that virtually any spot from which the sky can be seen may be lawfully spied upon by the police upon the mere whim of any petty officer. If the police are able to use such surveillance techniques without it being considered a search, then there can be no legitimate expectation of privacy for activities that occur beneath a skylight, within a walled courtyard or in a backyard surrounded by a ten foot fence.

Technology cannot be allowed to swallow our right to privacy, our right to be left alone, and our right not to be spied upon by our government.

"Technology developments are arising so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny.

This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case, the tight relationship between technology and power is most obvious. *Control over the technology of surveillance conveys effective control over our privacy, our freedom and our dignity*—in short, control over the most meaningful aspects of our lives as free human beings." (Emphasis added). Hearings on Surveillance Technology Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 95 Cong. 1st Sess., June 23, 1975 (Opening Statements of Senator Tunney).

Hodges, *Electronic Visual Surveillance And The Fourth Amendment: The Arrival Of Big Brother*, 3 Hastings Const.L.Q. 261, 265 N.25 (1976).

The use of an airplane to purposefully spy into a private fenced yard to see that which is otherwise unobservable is just such a use of technology.

Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion. At a recent but relatively primitive time, an X-2 plane could spy on ground activities from a height of 50,000 feet. Today's sophisticated technology permits overflights by vehicles orbiting at an altitude of several hundred miles. Tomorrow's sophisticated technology will supply optic and photographic devices for minute observations from extended heights. Judicial implementation of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance. In analyzing claims of immunity from aerial surveillance by agents of government, the observer's altitude is a minor factor. Horizontal extensions of the occupant's terrestrial activity form a more realistic and reliable measure of privacy than the vertical dimension of altitude . . . Reasonable expectations of privacy may ascend into the airspace and claim Fourth Amendment protection.⁷

Dean v. Superior Court, 35 Cal.App.3d 112, 110 Cal.Rptr. 585, 588-89 (1973). If Fourth Amendment protections do not apply to the police surveillance of respondent's private yard, then, where and after which new surveillance device, will this Court draw the line?

A free society cannot allow technology to force us all indoors in order to live without fear of being spied upon by our government. Free men must be unafraid to criticize

⁷ See Tell, *Suits Sight Spies in Sky*, National L.J., December 15, 1980 at 1, Col. 1, 28, Cols. 2-3 (U-2 spy planes can locate objects on the ground from up to 65,000 feet in the air.)

and even antagonize the government and its agents. Liberty cannot survive when the only protection from governmental spying left to a citizen is the hope that the government will not focus its attention and its technology upon him.⁸

II.

THE WARRANTLESS SEARCH OF RESPONDENT'S BACKYARD VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The constitutional reasonableness of a particular law enforcement practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *New Jersey v. T.L.O.*, 469 U.S. ___, 83 L.Ed.2d 720, 731-21, 105 S.Ct. 733, 741 (1985); *United States v. Montoya de Hernandez*, ___ U.S. ___, ___ L.Ed.2d ___, 105 S.Ct. 3304 (1985); *Delaware v. Prouse*, 440 U.S. 648, 654, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979).

On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

New Jersey v. T.L.O., 469 U.S. ___, 83 L.Ed.2d at 731-32, 105 S.Ct. at 741. This case does not involve an area with a reduced expectation of privacy such as an automobile or school. This is an assault on the one area that has heretofore been most heavily protected. See *Payton v.*

⁸ "I am more and more convinced that man is a dangerous creature; and that power, whether vested in many or a few, is ever grasping, and, like the grave, cries 'give—give!'"

The Book Of Abigail And John: Selected Letters Of The Adams Family, 1762-1784, Letter to John Adams, November 27, 1775.

New York, 445 U.S. 573, 585, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). The home is the one place where every man can retreat and relax in privacy. This Court is being asked to give the government blanket approval to focus its eyes and cameras upon any man's home and curtilage from any angle, so long as no technical trespass has occurred.

Because of the unlimited nature of this search, the privacy and security interests that have to be balanced are not only those of respondent's, or even his neighbors', but include the expectations of privacy of all people whose protected activities the government can watch from above. As this Court observed in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971), it was to minimize the use of harrassing so many innocent people that the Fourth Amendment requires the intervention of a judicial officer.

[The warrant requirement] is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement.

403 U.S. at 481.

Moreover, the search in this case was not conducted as a discrete invasion of privacy limited only to a search for marijuana on respondent's property. See *United States v. Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984); *United States v. Place*, 462 U.S. ___, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983). This police search was conducted at such a low altitude and with such photographic equipment that far more than the mere presence of marijuana was revealed. This search indiscriminately invaded the privacy of countless numbers of innocent citizens in

the Santa Clara vicinity. This search was, therefore, unlike the canine sniff in *United States v. Place*, or the chemical test in *United States v. Jacobsen*, where "[t]he reason this did not intrude upon any legitimate expectation of privacy was that the governmental conduct could reveal nothing about non-contraband items." 466 U.S. ___, 80 L.Ed.2d at 101 n.24, 104 S.Ct. at 1662 n.24.

Generally speaking, government searches which include the taking of photographs from a low flying airplane capture on film and make public everything that does not take place under an opaque roof. Furthermore, by examining such photographs, it is possible to identify the people with whom individuals associate. By applying additional technology, the government and later the public can expose life's little intimacies, including the titles of books people read.

It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search. (Citations omitted).

United States v. Kim, 415 F.Supp. 1252, 1256 (D.Haw. 1976).

The usefulness of aerial surveillance to eradicate open fields of marijuana where no reasonable expectation of privacy exists is not implicated in this case. See, e.g., *Oliver v. United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). This is also not a case where the Court need address the problem of the police discerning the boundaries between open fields and curtilage. It was the officer's admitted goal to peer over the fence and into respondent's yard to surveil the curtilage for the presence of marijuana. (J.A. 30-31). In the balance:

... it is ... immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be

most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479, 72 L.Ed 944, 48 S.Ct. 564, 572-73 (1928) (Brandeis, J., dissenting).

In this age of advancing and potentially unlimited technology, the Bill of Rights cannot be read as covering only the methods of surveillance known in the 18th century. Unless this Court safeguards the public from the warrantless use of surveillance technology, an omniscient police will soon stand guard over a watched society.

CONCLUSION

Citizens of this great and free society cannot be required to paint black the sky lights and windows of their homes, or erect roofs over their yards, in order to have a reasonable expectation of privacy in their places of abode.

If the law now supposes that society deems such measures necessary, the law may add new recruits to those members of the public who already are inclined to agree with Mr. Bumble's well known remark, "If the law supposes that . . . the law is a ass . . . a idiot." C. Dickens, *Oliver Twist*, p. 377 (1912); Cf. *Estate of Thomas A. Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 58 L.Ed.2d 191, 192 n.3, 99 S.Ct. 366 (1978).

A free society cannot survive if its citizens are required to take measures that absolutely, rather than reasonably,

ensure that their privacy cannot be invaded by the government.

Respectfully submitted,

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OCT 4 1985

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CLERK

(11)
No. 84-1513

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRAULO,
Respondent.

On Writ of Certiorari to the
California Court of Appeals
for the First District

BRIEF OF THE CIVIL LIBERTIES
MONITORING PROJECT AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the state's intentional visual surveillance into an American's curtilage is a search intruding upon a reasonable expectation of privacy in violation of the Fourth Amendment.

2. If the state's intentional aerial surveillance into the curtilage is not a full-fledged search, whether the brief aerial surveillance of a curtilage is a Fourth Amendment intrusion as significant as a stop of the person, requiring particularized suspicion.

TABLE OF CONTENTS

	<u>Page</u>
Questions presented.....	i
Table of Authorities.....	iii
Interests of Amicus Curiae.....	2
Summary of Argument.....	3
Argument.....	6

I

THE STATE'S INTENTIONAL VISUAL SURVEILLANCE INTO A CURTILAGE IS A SEARCH INTRUDING UPON A REASONABLE EXPECTATION OF PRIVACY IN VIOLATION OF THE FOURTH AMENDMENT.....	6
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II

IF THE STATE'S INTENTIONAL AERIAL SURVEILLANCE, FOR A BRIEF TIME, INTO A CURTILAGE IS NOT A FULL-FLEDGED SEARCH, IT IS AT LEAST AS SIGNIFICANT AN INTRUSION AS A BRIEF STOP, THUS REQUIRING PARTICULARIZED SUSPICION.....	18
Conclusion.....	29

TABLE OF AUTHORITIES CITED

Cases	Page
<u>Brown v. Texas</u> 443 U.S. 47 (1979).....	20
<u>Coolidge v. New Hampshire</u> 403 U.S. 443,469-470 (1971).....	9
<u>Dow Chemical v. United States</u> 749 F.2d 307 (6th Cir. 1984) <u>cert.granted</u> , U.S.____, L.Ed.2d____, 105 S.Ct. 2700.....	23
<u>Katz v. United States</u> 389 U.S. 347 (1967).....	8
<u>Mincey v. Arizona</u> 437 U.S. 385,393-395 (1978).....	27
<u>New York v. Belton</u> 453 U.S. 454,458-459 (1981).....	22
<u>National Organization for the Reform of Marijuana Laws v. Mullen</u> 608 F.Supp. 945 (D.C.Cal. 1985).....	2,10,17
<u>Oliver v. United States</u> 466 U.S.____, 80 L.Ed.2d 214,.....	passim
<u>People v. Arno</u> 90 Cal.App.3d 505,509-512 (1979).....	24

<u>State v. Rogers</u>	
673 P.2d 142,144 (N.M.App. 1983).....	20
<u>Terry v. Ohio</u>	
392 U.S. 1,16 (1968).....	19
<u>United States v. Allen</u>	
675 F.2d 1373,1381	
(9th Cir. 1980) <u>cert. denied</u>	
454 U.S. 833 (1981).....	20
<u>United States v. Cortez</u>	
449 U.S. 411,417-418 (1981).....	19
<u>United States v. DeBacker</u>	
493 F.Supp. 1078,1081	
(W.D.Mich.1980).....	20
<u>United States v. Kim</u>	
415 F.Supp. 1252 (D.Haw. 1976).....	10
<u>United States v. Lace</u>	
669 F.2d 46,57 (2d Cir. 1982).....	21
<u>United States v. Marbury</u>	
732 F.2d 390,398-399	
(5th Cir. 1984).....	20
Other Authorities	
George Orwell, <u>Nineteen Eighty-Four</u>	
(1949).....	7

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ON WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL FIRST APPELLATE DISTRICT

BRIEF OF THE CIVIL LIBERTIES MONITORING
PROJECT AS AMICUS CURIAE IN SUPPORT OF
RESPONDENT

INTERESTS OF AMICUS CURIAE

The Civil Liberties Monitoring Project ("Project") is a nonprofit California corporation. The principal focus of the Project is on the continued preservation and enhancement of individual rights and liberties. The Project engages in discussions and other forms of education concerning civil liberties and civil rights. General aerial surveillance threatens the privacy and welfare of the organization's members, particularly because many of its members live in isolated areas in rural counties subject to this new law enforcement technique.

Amicus is presently engaged in litigation with the Federal Government and the State of California in a case challenging governmental aerial surveillance. The National Organization for the Reform of

Marijuana Laws v. Mullen, 608 F.Supp. 945 (D.C.Cal. 1985).

SUMMARY OF ARGUMENT

The state, and amici in support of the state, write as if this case concerns only a marijuana garden.¹ In fact, at stake in this case is the privacy of Americans in their own homes and curtilages.

The state's argument--that the aerial search conducted in this case is not really a search and in any event not unreasonable--logically would permit searches by other technological means,

1. For the sake of simplicity, amicus will refer to the arguments of the state as including those arguments advanced by the amici curiae in support of the state.

at best degrading an expectation of privacy as we know it, and permitting substantial, difficult to control, abuses.

The state's argument is at war with Fourth Amendment law and any reasonable policy attempting to accommodate both the state's interests and the important policies underlying the Fourth Amendment. For this Court to establish a narrow principle of law upholding only this type of plane search would further complicate Fourth Amendment jurisprudence; but to establish one of the broad principles of law advocated by the state and amici would inadvertently lay the groundwork for an Orwellian-type government able to keep its subjects under 24-hour surveillance.

Amicus asks this Court to declare that Americans' subjective

expectation of privacy from unfettered governmental spying into their homes and curtilages is an expectation this Court, and society in general, is prepared to recognize as reasonable, and thus constitutionally protected. At a minimum, this Court should hold that a brief aerial search of a curtilage is a privacy intrusion as serious as a stop of the person, and thus requires founded suspicion.

ARGUMENT

I

THE STATE'S INTENTIONAL VISUAL
SURVEILLANCE INTO A HOME OR
CURTILAGE IS A SEARCH INTRUDING
UPON A REASONABLE EXPECTATION
OF PRIVACY IN VIOLATION OF THE
FOURTH AMENDMENT

The state's primary argument is the Fourth Amendment prohibits only physical intrusions into the privacy of one's home and curtilage; visual searches into one's home and curtilage are not really searches. (Brief for Petitioner at 16-17, 32-34). Amicus agrees with the state there is no meaningful distinction between the constitutional protection Americans enjoy in their homes, as opposed to their curtilages (Brief for Petitioner

at 34 & n.10). The curtilage of a home is the area to which extends "the intimate activity associated with the sanctity of a man's home and the privacies of life." Oliver v. United States 466 U.S._____,_____, 80 L.Ed.2d 214,225; 104 S.Ct. 1735,1742 (1984). Because the principle of law is the same, Amicus will often refer to the house and the curtilage simply as the home.

The problem with the state's distinction between a visual and physical search is that from the viewpoint of most Americans a visual search is just as intrusive as a physical search. In George Orwell's Nineteen Eighty-Four (1949), Big Brother did not physically intrude upon the subjugated populace's homes and curtilages. Instead, the omnipresent video screens and helicopters adequately

kept people under constant surveillance.

The state's theory is inconsistent with the law. Whether the police are physically in a place where they have a legal right to be is not determinative of the legality of a search that is conducted from that place. For example, the telephone wiretap the police placed in the public telephone booth in Katz was also in a place it had a legal right to be. Katz v. United States, 389 U.S. 347 (1967). Thus, because the right of privacy focuses on a person's reasonable expectation of privacy, the issue in this case is whether Americans reasonably expect some protection from general systematic aerial surveillance of the curtilage. Whether the state has physically intruded onto property is simply not a determining factor in

assessing a Fourth Amendment privacy violation. Oliver v. United States, supra, 466 U.S.____, 80 L.Ed.2d 214,227.

A critical factor is whether the state's visual intrusion was intentional or accidental. Certainly, Americans do not object to the casual, inadvertent view of a neighbor or police officer into their homes or backyards. Moreover, such an inadvertent plain view is legally permissible. Coolidge v. New Hampshire, 403 U.S. 443, 469-470 (1971). But virtually all Americans object to Peeping Toms peering into their windows late at night or spying upon them in their backyard to catch a glimpse of some private matter. Americans engage in private matters in the privacy of their backyards and homes without feeling the need to build opaque domes and to shutter

windows because the risk of Peeping Toms is so minimal that Americans generally do not live in paranoid fear of such intrusions. There is a big difference, however, between Peeping Toms and the government. See e.g. United States v. Kim, 415 F.Supp. 1252,1256-1257 (D.Haw. 1976).

Recently, the government has launched a war called the Campaign Against Marijuana Planting (CAMP) against thousands of innocent Americans in an effort to curtail marijuana cultivation. In National Organization for Reform of Marijuana Laws v. Mullen, 608 F.Supp. 945 (D.C.Cal. 1985), the court recounted numerous incidents where federal and state personnel used helicopters to look into persons' homes and curtilages, and to chase innocent people into the woods or

frighten them. Id. at 950-951,955-56. Marilyn Beckworth, for example, was "continually buzzed" by a helicopter while taking her outdoor shower. Id. at 955. Allison Osborne testified that occupants of a law enforcement helicopter flew about fifty feet above the ground right outside her home and made obscene gestures at her seven year old daughter. Id. She said it felt like Vietnam as the "leaves from the trees are blowing down on your head and the children are kind of hanging on to you because it feels like you'll be gusted away." Id. at 956. A CAMP helicopter blew the toilet paper from Charles Keyes reach as he was using his outhouse. Mr. Keyes and his five year old son Arthur left their property in fear of their safety. Id. at 955.

The court summarized the

unbelievable conduct of the government as follows:

"Rather, the uncontradicted evidence shows regular intrusions into the areas immediately surrounding the home. These helicopters are no longer just surveying open fields, but are deliberately looking into and invading peoples' homes and curtilage. Moreover, this prying is not limited to an occasional, casual peek during an overflight to a raid site, but is accomplished through sustained and repeated buzzings, hoverings, and dive bombings that at best disturb, and at worst terrorize, the hapless residents below.

It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into "the privacies" of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at

once an effective law enforcement tool and an unprecedented threat to civil liberties."

Id. at 957.

Under the state's theory, however, an aerial search is a "non-search"; it is only a search if the police land the helicopter on one's home or in one's backyard. This doublespeak harkens back to Orwell. When a search is no longer really a search; when a helicopter hovering at one's bedroom window is not a violation of one's privacy; when intentional aerial surveillance of one's home and curtilage is no longer an intrusion, then words become meaningless and Americans' lack of respect for law and justice sinks deeper.

If Americans' subjective expectation of privacy in their homes and

curtilages is unreasonable as applied to visual spying, Americans will not be able to engage in any private, intimate matter in any place in the world except behind closed doors and shuttered windows. Americans do not reasonably expect privacy in their backyards because they are all growing marijuana. There are hundreds of activities people enjoy doing in their backyard, in part because they believe they have privacy. Such activities include playing with one's children, having a talk with one's son, showing affection to one's spouse, or having friends over for a barbeque.

Simply imagine a police agent's head hanging over a backyard fence, or perched in a tree in an open field, or sticking out of a hovering helicopter or a circling plane watching a teenage

daughter's birthday pool party. Would it be reasonable if her father believed the police officer was invading his family's privacy even though the agent had not physically entered his backyard and began swimming and dancing with his daughter and her friends? Would it be reasonable for her mother to tell the police officer to leave them alone--that her daughter and her friends felt inhibited so long as the police officer watched. Yet, the officer would have as much reason to watch this birthday party for possible crime as to survey every American's backyard garden for marijuana. Young people have been known unlawfully to drink alcohol, use drugs or engage in sex at parties at least as frequently as the average American grows marijuana in his backyard.

The state, however, does not

discuss teenage birthday parties. Instead, the state argues the crime of growing marijuana in one's backyard is so terrible that all Americans ought to be willing to give up their right to privacy anywhere the sun can shine. The real issue is whether it is reasonable for Americans to expect privacy at their childrens' backyard birthday parties or weddings, or in their bedrooms. In short, a visual invasion into the privacy of one's home or curtilage is not different enough from a physical intrusion to justify less than full Fourth Amendment protection: probable cause and a search warrant.

The state's concern the police will have difficulty not looking into Americans' curtilages or homes, while freely looking into open fields, is misdirected. This Court recognized the

courts and the police are capable of distinguishing between open fields and curtilages. Oliver v. United States, supra, 466 U.S. at ___, 80 L.Ed.2d at 226 n.12. There is no showing--nor could there be--that police patrols in planes have a difficult time distinguishing between a home and its curtilage and an open field. Any person with eyesight good enough to qualify to fly a plane, can distinguish between a home and an open field. In California, the CAMP operation is presently under court order to keep helicopters and planes at least 500 feet away from all homes. National Organization for the Reform of Marijuana Laws v. Mullen, 608 F.Supp. 945, 965-66 (D.C.Cal. 1985). Only intentional intrusions are enjoined. Id. at 965 n.17.

It is imperative to distinguish

between an intentional visual intrusion into a home, and an inadvertent view. The state's intentional invasion into Americans' last bastion of privacy is necessarily different from a casual glance of a passerby or the casual sightings of plane passengers. Intentional police surveillance has the potential of cowering the populace and suppressing the vitality and joy of life of a nation.

II

IF THE STATE'S INTENTIONAL AERIAL SURVEILLANCE, FOR A BRIEF TIME, INTO THE CURTILAGE IS NOT A FULL-FLEDGED SEARCH, IT IS AT LEAST AS SIGNIFICANT AN INTRUSION AS A BRIEF STOP, THUS REQUIRING PARTICULARIZED SUSPICION

Amicus agrees with the state that it is significant the police took to

the air in this case "following a report of suspicious activity." (Brief of Petitioner at 19). Random, general aerial searches of everyone's home without a warrant are far more objectionable than the aerial surveillance of a particular person's home for which the police have founded suspicion of a crime. If this Court does not believe this particular plane search to be a full-fledged search requiring probable cause, it is at least as intrusive as a brief stop on the street--requiring particularized suspicion. See, e.g., United States v. Cortez, 449 U.S. 411, 417-418 (1981); Terry v. Ohio, 392 U.S. 1, 16 (1968). Many of the aerial searches upheld by lower courts involve some amount of particularized suspicion rather than general, systematic surveillance of

everyone. See, e.g., United States v. Marbury, 732 F.2d 390,398-399 (5th Cir., 1984); United States v. Allen, 675 F.2d 1373,1381 (9th Cir. 1980), cert. denied 454 U.S. 833 (1981); United States v. DeBacker, 493 F.Supp. 1078,1081 (W.D. Mich. 1980); State v. Rogers, 673 P.2d 142,144 (N.M.App. 1983).

A generalized suspicion that some persons in a certain county are growing marijuana, however, does not justify the wholesale invasion of everyone's privacy who lives within the county. See Brown v. Texas, 443 U.S. 47 (1979) (being present in a high crime area with a great deal of drug traffic is not a sufficiently suspicious circumstance to justify the momentary stop of a particular individual and to request identification from him.) Moreover, unless this Court

requires at least a standard of founded suspicion, "by only modest logical extension, legitimacy [will be] conferred on 'random' enhanced viewing of a whole neighborhood of unfenced yards from a government satellite in geosynchronous orbit." (Brief of Petitioner at 43 n.16).

A minimal standard of founded suspicion is essential to prevent the state from enjoying an unfettered right to spy upon Americans twenty-four hours a day for weeks at a time so long as the police hide in the open fields or woods, or use high-flying planes, rather than openly enter backyards where they would be visible. See United States v. Lace, 669 F.2d 46,57 (2d Cir. 1982). (Court upheld three weeks of warrantless 24-hour surveillance by camouflaged police officers peering through telescopes from

the wooded fields).

If Americans have no reasonable expectation of privacy from aerial surveillance into their homes and curtilages, then it would be lawful for the state to photograph bedrooms through skylight windows in the roof, or use X-rays to penetrate a curtained window or a solid roof. It would simply be unreasonable, however, to force law-abiding Americans interested in preserving their privacy to line the walls, windows and roofs of their homes with a substance impenetrable to X-rays or to build an opaque dome over their curtilages.

In establishing a clear, bright-line rule in this difficult Fourth Amendment area, see New York v. Belton, 453 U.S. 454, 458-459 (1981), the

well-understood standard of founded suspicion is preferable to many of the standards proposed by the state.

For instance, this Court should not give constitutional significance to the type of visual surveillance the state used in conducting the search. (See Brief of Petitioner at 13, 20-21). It would only add further confusion to Fourth Amendment jurisprudence to give lower courts the Herculean task of distinguishing among the myriad kinds of ground searches, helicopter searches, the plane search in this case, plane searches at 2000 feet with binoculars; U-2 spy plane searches at 10,000 feet with sophisticated photographic equipment, cf. Dow Chemical Company v. United States, 749 F.2d 307 (6th Cir. 1984), cert. granted, ___U.S.___, L.Ed.2d___, 105 S.Ct.2700; and

spy satellites using computers to keep Americans under 24-hour surveillance. The impact on Americans' right to privacy is similar, no matter where the vantage point of the state agent, or what the technological equipment.

This Court should also not burden lower courts with the need to decide whether a particular technological device allowed the state to view an object that otherwise could only have been seen by physically intruding into the curtilage. One can imagine the absurd lengths the defense and prosecution could go in trying to prove that an object seen by the police could not have been seen from a legal vantage point without the use of the technological device. (See e.g. People v. Arno, 90 Cal.App.3d 505,509-512 (1979)).

The result in this case should not depend on the location of Ciraolo's home. The fact Ciraolo's home happened to be located in a suburban area in close proximity to a major airport should be deemed irrelevant. It would make a mess of Fourth Amendment jurisprudence to force lower courts to hold hearings about the proximity of airports to an American's home, the absence or presence of air traffic over a person's land, or whether the visual search of a home occurred in an urban in contrast to a remote rural area of the country. It would also be unfair to distinguish among Americans in this arbitrary fashion with respect to the highly-valued blessings of freedom and privacy.

It should also be immaterial that Ciraolo's home and backyard had a

fence, but nevertheless, might have been in view of neighbors, utility workers, roofers, or children climbing trees. Many Americans live in homes and spend private moments in backyards which are more or less protected from view than was Ciraolo's home. This Court should avoid establishing a rule of law which would encourage Americans to build high walls, moats, opaque domes, or castles. To distinguish among Ciraolo's suburban home and a suburban home without a fence; or one with a high wall and many trees around it and one without trees; or a rural home in a remote location protected by dogs and fences and a rural home hidden in the woods would only deepen the quagmire of Fourth Amendment jurisprudence. The issue is not whether private citizens can spy upon neighbors, or whether the police can

accidentally look into a home; the issue is the propriety of intentional visual searches into a curtilage by the state's police.

It would be unprincipled to allow the legality of visual searches to depend upon the type of object seen. Under this theory, the legality of an aerial search would depend upon whether an American used his backyard for sunbathing as well as for marijuana cultivation. Fourth Amendment protection has never depended upon whether the police were looking only for marijuana and saw only marijuana. Just as there is no murder scene exception to the Fourth Amendment, Mincey v. Arizona 437 U.S. 385, 393-395 (1978), there is no marijuana scene exception to the Fourth Amendment. Thus, Ciraolo's fenced suburban backyard should

not lose its status as a curtilage because a lot of marijuana was grown in it. It would cause unimaginable confusion to have courts define a curtilage on the basis of the size or number of marijuana plants grown within it.

Amicus feels compelled to add a final word in response to the state's arguments about the probable impact of this Court's decision on marijuana cultivation and use. The state has made no showing that allowing unfettered aerial surveillance will have any effect on the total supply or demand for marijuana. After Oliver, the state has an unlimited right to engage in general systematic aerial surveillance of 95% of the land mass of the United States.

Even assuming a few marijuana plants may escape detection in the

curtilages of homes (rather than escape detection in enclosed greenhouses, or closets, or foreign countries), the issue is whether Americans are willing to pay this minimal price to ensure the state will not have the unfettered discretion to watch a pool party, a wedding, a show of affection or a playful romp with one's children occurring in one's backyard or bedroom with the sunshine streaming in through the window.

CONCLUSION

The Civil Liberties Monitoring Project respectfully requests this Court to decide this intentional aerial intrusion into the sanctity of Ciraolo's curtilage is a Fourth Amendment search requiring probable cause and a search warrant. At a minimum, Amicus believes a

standard of founded suspicion for this
kind of search is imperative.

Dated: September 29, 1985

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL
THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRAULO, No.84-1513
Respondent.

State of California
City and County of San Francisco | as

Amitai Schwartz, a member of the Bar of
the Supreme Court of the United States,
being duly sworn, deposes and states:

That his business address is 155
Montgomery Street, Suite 800 in the City
and County of San Francisco, State of
California; that on October 4, 1985 true
copies of the attached Brief for Amicus
Curiae in the above-entitled matter were
served on counsel of record by placing
same in envelopes addressed as follows:

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No. 84-1513

Supreme Court, Cal.
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OCT 4 1984

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

VS.

DANTE CARLO CIRAULO,

Respondent.

**On Writ of Certiorari to the
California Court of Appeals
for the First Appellate District**

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA AS AMICI CURIAE IN
SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	i
Interest of Amici Curiae.....	1
Summary of Argument	2
Argument	3
I. Mr. Ciralo possessed a reasonable expectation of privacy in his enclosed backyard, which was entitled to Fourth Amendment protection.....	3
II. Areas not exposed to public view do not lose Fourth Amendment protection because of the availability of technologically enhanced surveillance methods	10
Conclusion	16

TABLE OF AUTHORITIES

Cases

	<u>Page(s)</u>
Air Pollution Variance Bd. v. Western	
Alfalfa, 416 U.S. 861	6
Berger v. New York, 388 U.S. 41	10
Coolidge v. New Hampshire, 403 U.S. 443	11, 15
Dean v. Superior Court, 35 Cal.App.3d 112,	
110 Cal.Rptr. 585	11, 13
Fullbright v. United States, 392 F.2d 432,	
certiorari denied 393 U.S. 830	13
Goldman v. United States, 316 U.S. 129	10
G.M. Leasing Corp. v. United States,	
429 U.S. 338	6
Gouled v. United States, 255 U.S. 298	11
Johnson v. United States, 333 U.S. 10	4
Katz v. United States, 389 U.S. 347	2, 3, 4, 5, 7, 11, 15
Ker v. California, 374 U.S. 23	8
Oliver v. United States, 466 U.S. _____,	
104 S.Ct. 1735	3, 6, 7, 8, 9
Olmstead v. United States, 277 U.S. 438	10
Payton v. New York, 445 U.S. 573	6, 11
People v. Sneed, 32 Cal.App.3d 535, 108	
Cal.Rptr. 146	11, 13
Rakas v. Illinois, 439 U.S. 128	5, 8
Schneckloth v. Bustamonte, 412 U.S. 218	4
Smith v. Maryland, 442 U.S. 735	5, 7
State v. Arno, 90 Cal.App.3d 505,	
153 Cal.Rptr. 624	13
State v. Kender, 60 Haw. 301, 588 P.2d 447	13
United States v. Allen, 675 F.2d 1373,	
certiorari denied 454 U.S. 833	5, 10, 13
United States v. Carratala,	
No. 83-393-Cr-SMA(s)	10
United States v. Di Re, 332 U.S. 581	8
United States v. Karo, 468 U.S. _____,	
104 S.Ct. 3296	3, 12
United States v. Kenaan, 496 F.2d 181	12

Page(s)

United States v. Kim, 415 F.Supp. 1252	10, 13
United States v. Knotts, 460 U.S. 276.....	3, 12
United States v. Robinson, 414 U.S. 218	4
United States v. Taborda, 635 F.2d 131.....	7, 10, 13
Warden v. Hayden, 387 U.S. 294.....	4

Constitutional Provisions

United States Constitution	
Fourth Amendment.....	2, passim

Other Authorities

Amsterdam, Perspectives on the Fourth Amendment (1974) 58 Minn.L.Rev. 349	15
1 LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1978)	9, 15
Ringel, Searches & Seizures, Arrests and Confessions (1985).....	15

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**BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICI CURIAE¹

This case presents the question whether law enforcement officers, without probable cause and without a search warrant, may conduct aerial surveillance of the private area immediately surrounding a home, or "curtilage," which the homeowner has protected from public view.

The American Civil Liberties Union ("ACLU") is a national, nonprofit organization of persons dedicated to

¹ Letters from counsel for both parties consenting to the filing of a brief amici curiae are submitted with this brief.

safeguarding civil rights and civil liberties. The American Civil Liberties Union of Northern California ("ACLU-NC") is the regional affiliate of the ACLU. These amici curiae submit this brief because the argument advanced to support the activities of the police in this case would, if accepted, fundamentally alter our historic expectations that the home and its immediate surroundings are areas in which people may maintain privacy in their intimate human relations and affairs. Reversal of the decision of the California court in this case would destroy an expectation of privacy which must be protected from intrusive, technologically enhanced, governmental surveillance if the purpose of the Fourth Amendment is to be achieved.

SUMMARY OF ARGUMENT

In *Katz v. United States* (1967) 389 U.S. 347, 351-352, the Court set out a framework for resolution of Fourth Amendment questions, which made clear that what a person seeks to preserve as private may be constitutionally protected. The principle applies to a person making a call in a public telephone booth, and should apply with even greater force to a person enjoying his private backyard. Both individuals have reasonable expectations of privacy which the state cannot invade without first obtaining a search warrant.

In contrast to "open fields," in which a person has diminished privacy interests and expectations, curtilage, the outdoor area immediately surrounding the home, was considered by the common law to be part of the home itself for search and seizure purposes. It is an area where intimate and private human activities historically have occurred, and must be permitted to continue to occur, free from intrusive governmental surveillance, if privacy interests that lie at the core of our constitutional form of government are to be preserved. Private activities which are closely associated with and occur nearby the home

should not be invaded by inquisitive law enforcement officers without warrants (*Oliver v. United States* (1984) 466 U.S. ___, 104 S.Ct. 1735, 1741).

Technological advances in the area of surveillance threaten to undermine the individual's right to be secure in his or her home from unreasonable searches. It is true that matters which a person knowingly exposes to routine public observation may also be viewed by the police. This Court's decisions equally recognize that privacy interests in the home which a person takes reasonable precautions to protect from public view do not evaporate simply because the police may invade them by non-physically intrusive methods of technological surveillance (*United States v. Karo* (1984) 468 U.S. ___, 104 S.Ct. 3296; *United States v. Knotts* (1983) 460 U.S. 276). The Fourth Amendment must not be interpreted so narrowly that the police can fundamentally alter historically recognized privacy interests in the curtilage by resorting to innovative surveillance methods. The warrant requirement and the crucial probable cause standard, both specified by the constitutional text, are necessary protections to ensure that the general public is safe from overzealous state intrusions into intimate private matters.

ARGUMENT

I. MR. CIRAULO POSSESSED A REASONABLE EXPECTATION OF PRIVACY IN HIS ENCLOSED BACKYARD, WHICH WAS ENTITLED TO FOURTH AMENDMENT PROTECTION.

Since *Katz v. United States* (1967) 389 U.S. 347, the touchstone of Fourth Amendment analysis has been whether a person has a "constitutionally protected reasonable expectation of privacy" (*Oliver v. United States* (1984) 466 U.S. ___, 104 S.Ct. 1735, 1740). In *Katz*, the Court held that FBI agents had violated the Fourth Amendment by failing to obtain a search warrant before

installing an electronic listening and recording device in a public telephone booth to obtain evidence against Katz, a suspected bookmaker. The Court recognized that, because of the advent of eavesdropping devices, people's privacy could be unconstitutionally invaded without the necessity of a technical trespass (*Katz v. United States* (1967) 389 U.S. 347, 353; see *id.* at 362 (Harlan, J., concurring)). The Court stated that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (*id.* at 351-352).² In his concurrence in *Katz*, Justice Harlan stated the standard for determining whether particular searches violated the Fourth Amendment as a two-part test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'" (*id.* at 361).

In the instant case, there is no question that Mr. Ciruolo exhibited a subjective expectation of privacy, and that this expectation was reasonable. He protected his backyard from outside observation by an exterior fence six feet in height and by an interior fence rising about 10 feet, which connected the perimeter fence to the house (Joint Appendix 11-12, 37-38). This act put the police (and everyone else) on notice that Mr. Ciruolo had demarcated an area of privacy. As the Court has stated:

"One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or

² The *Katz* Court also reiterated the rule that warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions (389 U.S. at 357)—none of which are relevant to the case presently before the Court (e.g., search incident to arrest (*United States v. Robinson* (1973) 414 U.S. 218, 235); search associated with "hot pursuit" (*Warden v. Hayden* (1967) 387 U.S. 294, 298-299); search pursuant to consent (*Schneekloth v. Bustamonte* (1973) 412 U.S. 218, 222); and search for evidence threatened with removal or destruction (see *Johnson v. United States* (1948) 333 U.S. 10, 15)).

controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude" (*Rakas v. Illinois* (1978) 439 U.S. 128, 144, n. 12).

The area searched in this case, Mr. Ciruolo's private backyard, was subject to a greater expectation of privacy than the public telephone booth in *Katz*. A person who swims in the family pool or sunbathes on the backyard patio expects to be free to engage in these activities without being scrutinized from the air (see Brief for Petitioner on Writ of Certiorari, hereinafter "Br. for Petitioner," 9 (photograph revealed Mr. Ciruolo's yard, family swimming pool, patio and sun umbrella)).

It would be preposterous to assert that Mr. Ciruolo surrendered his expectation of privacy by failing to prevent a specially chartered police surveillance plane from inspecting his property. Under the Fourth Amendment, surely a person should not be required to erect a roof or canopy blocking the air and the light of the sun to preserve a privacy interest in his own backyard.³ A person need only take "normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy" (*Rakas v. Illinois*, *supra*, 439 U.S. at 152 (Powell, J., concurring)). In *Katz*, for example, the individual had only to close the glass door of the telephone booth behind him (*Katz v. United States*, *supra*, 489 U.S. at 352).⁴

³ See *United States v. Allen* (9 Cir. 1980) 675 F.2d 1373, 1380, certiorari denied (1981) 454 U.S. 833 ("[A] person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy * * *").

⁴ Even if Mr. Ciruolo were aware that his neighborhood was subject to air surveillance, his Fourth Amendment protections would not disappear. Continued violations should not be allowed to justify themselves. Along the same lines, the Court in *Smith v. Maryland* (1978) 441 U.S. 735, 740-741, n. 5, proposed a hypothetical in which the government suddenly announces on nationwide television that all homes would henceforth be subject to warrantless entries. Expectations of privacy would be destroyed, but not reasonably, and the Fourth Amendment would still be violated.

In its recent decision in *Oliver v. United States* (1984) 466 U.S. —, 104 S.Ct. 1735, this Court, while not resolving the question presented here (see *id.* at 1742, n. 11), sharply distinguished between the reasonability of an individual's historically recognized privacy interest in the "curtilage," or area immediately surrounding the home, and an "open field." Sustaining the search of "open fields" in that case, the Court noted that several factors determine whether a privacy interest is entitled to Fourth Amendment protection, including the intention of the Framers, the uses for which a particular location is customarily employed and "our societal understanding that certain areas deserve the most scrupulous protection from government invasion * * *" (*id.* at 1741). In light of these factors, it concluded that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, *except in the area immediately surrounding the home*" (*ibid.*) (emphasis added). The Fourth Amendment "reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference," particularly the "sanctity of the home" (*ibid.*). Further,

"the common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home. * * * At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' * * * and therefore has been considered part of home itself for Fourth Amendment purposes" (*id.* at 1742) (emphasis added).⁵

⁵ The Court cited with approval lower court decisions which enforced Fourth Amendment protections in the area immediately adjacent to the home (104 S.Ct. at 1742). See also *Payton v. New York* (1979) 445 U.S. 537, 587, quoting *G.M. Leasing Corp. v. United States* (1976) 429 U.S. 338, 354 (distinguishing between a warrantless seizure in open area and on private premises); *Air Pollution Variance Bd. v. Western Alfalfa* (1974) 416 U.S. — (footnote continued on next page)

The State's arguments to the contrary rest on fundamental misconceptions repeatedly rejected by this Court's decisions. Primarily, the State argues that the historical protection of the curtilage extends only to "warrantless physical intrusions" (Br. for Petitioner 12; see *id.* at 20-21), despite this Court's repeated holdings that a physical trespass is neither necessary (see, e.g., *Katz v. United States*, *supra*, 389 U.S. 347, 353) nor sufficient (*Oliver v. United States*, *supra*, 104 S.Ct. 1735) to establish a Fourth Amendment violation.

Similarly, the State asserts that Mr. Ciraolo's subjective expectation was that the police would not discover his contraband, and concludes that such an expectation is unreasonable (Br. for Petitioner 16-21). Under this analysis, *Katz* would not have been protected by the Fourth Amendment since his subjective expectation was that the FBI agents would not overhear his telephone conversation. The correct approach is to focus on expectations of privacy which people generally have in their homes and backyards (or, in *Katz*, the telephone booth), rather than solely on suspected unlawful activity occurring there. What is critical is that a person has sought "to preserve [something] as private" (*Smith v. Maryland* (1978) 442 U.S. 735, 740, quoting *Katz v. United States*, *supra*, 389 U.S. at 351). As one court stated:

"We take this first factor to mean in essence that the defendant must have acted in such a way that it would have been reasonable for him to expect that he would not be observed" (*United States v. Taborda* (2 Cir. 1980) 635 F.2d 131, 137).

In *Katz*, for example, the defendant occupied a telephone booth, shut the door and paid the toll (389 U.S. at 352). In

(footnote continued from previous page)

861, 865 (Fourth Amendment protections do not extend to sights seen in open fields).

the present case, Mr. Ciruolo erected high fences around his backyard.⁶

The State also misinterprets the requirement that the expectation of privacy must be reasonable. The question is not whether a person should be allowed to engage in illegal activities or possess contraband (see Br. for Petitioner 22-23). An illegal search is not made legal by the evidence it uncovers (*United States v. Di Re* (1948) 332 U.S. 581, 595). A warrantless search normally is unconstitutional even if contraband is found. The safeguards of the Fourth Amendment protect all individuals, known or suspected offenders as well as innocent people (*Ker v. California* (1963) 374 U.S. 23, 33). The controlling question is whether the police's intrusion infringed upon the personal and societal values protected by the Fourth Amendment (*Oliver v. United States*, supra, 104 S.Ct. at 1743). As the Court has stated:

"Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (*Rakas v. Illinois*, supra, 439 U.S. at 144, n. 12).

Here, the expectation of privacy in a fenced-in backyard has been recognized for centuries by Anglo-American common law and is supported by clear understandings recognized by society. That expectation is surely reasonable for Fourth Amendment purposes.

⁶ There is no support in the record for the suggestion made in the brief for the Criminal Justice Legal Foundation (hereinafter "Br. for Legal Foundation") that Mr. Ciruolo's backyard was in a regular flight path or subject to routine overflight by commercial aircraft. In any event, the slight probability of overflight by and unintended observation from such aircraft presents virtually no threat to legitimate privacy interests and expectations, in marked contrast to focused surveillance from a low-flying, specially chartered police airplane, as in this case.

The briefs submitted by petitioner and amicus curiae Criminal Justice Legal Foundation contend that activities that take place in a fenced-in residential backyard without an opaque dome over it are activities "open to view" (Br. for Petitioner 14), "obvious and patent" (id. at 25) and "exposed to everyone" (id. at 33). The Legal Foundation takes this premise to its illogical conclusion with the invention of a new exception to Fourth Amendment requirements: an alleged "open skies" exception (Br. for Legal Foundation 14).

In essence, the Legal Foundation argues that the validity of the search depends, not on the privacy associated with the home and immediately surrounding areas, but on the physical position of the police in surveilling those historically protected places (Br. for Legal Foundation 14). These arguments are not only foreign to Fourth Amendment doctrine but repugnant to society's expectations of what is private and what is not. They erroneously shift the focus of analysis from the reasonability of privacy expectations associated with a particular area to the location or means from or by which surveillance may be conducted. In this society, people do not normally expect their neighbors or the general public to surveil their backyards from an airplane. Uncritical use of labels like the "open skies" must not be allowed to destroy this expectation.⁷ The "open field" doctrine refers to the area searched, not the location of the searchers (*Oliver v. United States*, supra, 104 S.Ct. at 1741-1742). Professor LaFave agrees that this is the proper analysis (1 LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* (1978) §§2.2 and 2.3 & Supp. (1985)).

⁷ Of course, if a person's backyard abuts a hill or a high-rise building, that individual must recognize that these physical factors limit privacy, and the individual should conduct backyard activities, such as sunbathing, accordingly.

The fundamental issue presented by this case is whether the historic privacy interest enjoyed by all persons in their homes and immediately surrounding areas will be destroyed by exposure to extraordinary police surveillance because of the possibility that illegal activity may occasionally be discovered. The impairment of reasonable privacy interests and attendant freedom from governmental intrusions that such a course would entail compels its rejection.

II. AREAS NOT EXPOSED TO PUBLIC VIEW DO NOT LOSE FOURTH AMENDMENT PROTECTION BECAUSE OF THE AVAILABILITY OF TECHNOLOGICALLY ENHANCED SURVEILLANCE METHODS.

The implications of the present case are far-reaching. As early as 1928, Justice Brandeis warned, "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping" (*Olmstead v. United States* (1928) 277 U.S. 438, 474 (dissenting opinion)).⁸ In 1967, the Court recognized that "[t]he law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge" (*Berger v. New York* (1967) 388 U.S. 41, 49).

It is not being alarmist to recognize that police use of high-technology surveillance techniques poses a significant threat to Fourth Amendment protections. Police have at their disposal not only bugging devices, but thermal imaging systems for night surveillance,⁹ high-powered optical equipment,¹⁰ seismic sensors,¹¹ ultraviolet particle detec-

⁸ Justice Murphy similarly commented that "the search of one's home or office no longer requires physical entry, for science has brought forth more effective devices for the invasion of a person's privacy * * *" (*Goldman v. United States* (1942) 316 U.S. 129, 139 (dissenting opinion)).

⁹ *United States v. Carratala* (S.D.Fla.) No. 83-393-Cr-SMA(s).

¹⁰ See, e.g., *United States v. Taborda* (2 Cir. 1980) 635 F.2d 131; *United States v. Kim* (1976) 415 F.Supp. 1252.

¹¹ *United States v. Allen* (9 Cir. 1980) 675 F.2d 1373, certiorari denied (1981) 454 U.S. 813.

tors¹² and a variety of surveillance aircraft.¹³ The federal government has available to it much more sophisticated technological innovations, including high-flying reconnaissance jets and spy satellites. In the technological age of law enforcement, when abuse of power can damage lives as well as render privacy impossible, the Court must interpret the Fourth Amendment as it applies to novel surveillance methods to preserve its original purpose (see *Payton v. New York* (1979) 445 U.S. 573, 591, n. 33).¹⁴

Katz v. United States (1967) 389 U.S. 347 illustrates this Court's willingness to adapt its interpretation of the Fourth Amendment to meet new threats to privacy interests posed by technology. By shifting the focus from the protection of places to the protection of people, the Court recognized that an individual's privacy can be invaded through an electronic device without the person even knowing it. Aerial searches of a person's enclosed backyard pose dangers to legitimate privacy interest as serious as and precisely analogous to those posed by the bugging invalidated in *Katz*.

¹² *United States v. Kenaan* (1 Cir. 1974) 496 F.2d 181.

¹³ See, e.g., *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 110 Cal.Rptr. 585 (airplane); *People v. Sneed* (1973) 32 Cal.App.3d 535, 108 Cal.Rptr. 146 (helicopter).

¹⁴ Claims of police efficiency must not be allowed to be used as a pretext for eroding Fourth Amendment protections. In a discussion of the warrant requirement, the Court stated in *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 481:

"It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous executive officers' [*Gouled v. United States* (1921) 255 U.S. 298, 304] who are a part of any system of law enforcement."

Although the Legal Foundation argues that aerial searches are necessary to locate small gardens in rural areas (Br. for Legal Foundation 22), Mr. Ciruolo and his family do not live in some isolated, impenetrable location, but in an urban area. This fact hints at the potential for abuse if warrantless aerial searches are permitted on the grounds that no other method of law enforcement is adequate.

In light of these technological developments, which expose the most intimate details of everyday living to intensive government surveillance without the necessity of physical trespass, this Court has recognized that the focus of Fourth Amendment analysis must be on a person's reasonable expectation of privacy in the area to be protected, rather than on the means which the government may employ to invade that privacy. In *United States v. Karo* (1984) 468 U.S. —, 104 S.Ct. 3296, the Court held that the warrantless monitoring of an electronic beeper in a private residence violated the Fourth Amendment. Since the government obtained information that could not have been obtained by observation by members of the general public from outside the curtilage of the house, reasonable expectations of privacy were infringed just as if a government agent had entered the house without a warrant to search for the object sought.

"Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight" (id. at 3304).

Similarly, in the instant case, Mr. Ciruolo's backyard had been fenced from public view. It was only by means of a specially chartered airplane flying at a low level that the government was able to intrude into the privacy of the curtilage.

In contrast, in *United States v. Knotts* (1983) 460 U.S. 276, the Court held that no violation occurred in the monitoring of a beeper as it traveled in a car and arrived in the area of a cabin. The critical factor distinguishing *Karo* was that in *Knotts*, the beeper's route could have been observed by police or any member of the public stationed along the way or following the suspect's car on the public highway (460 U.S. at 282, 285). "A person traveling in an

automobile on public thoroughfares has no reasonable expectations of privacy in his movements from one place to another" (id. at 281). Thus, in *Knotts*, the information obtained was "voluntarily conveyed to *anyone who wanted to look*" (id.) (emphasis added). In such circumstances, use of a beeper to assist the observation did not alter the Fourth Amendment analysis. In contrast, in the present case, as in *Karo*, the object of the police search was not available to anyone who wanted to look, and was entitled to Fourth Amendment protection against invasive surveillance by a low-flying, specially chartered police aircraft.¹⁵

The same analysis exposes the fallacy of the State's contention that the search in this case was analogous to police observation from a nearby hill or from the window of an apartment (Br. for Petitioner 19, 24-25). Although some courts have invalidated such searches (e.g., *United States v. Kim* (D.Haw. 1976) 415 F.Supp. 1252; *State v. Arno* (1979) 90 Cal.App.3d 505, 153 Cal.Rptr. 624), they raise a much different question than the instant case. In such circumstances, a person's property is by hypothesis exposed to routine observation from locations which are accessible to members of the general public. A person who

¹⁵ Many decisions have invalidated aerial searches and less intrusive warrantless surveillance involving technologically enhanced viewing where the place searched was one to which (unlike an open field) a reasonable expectation of privacy adhered. See, e.g., *United States v. Taborda* (2 Cir. 1980) 635 F.2d 131 (telescopic surveillance of interior of residence); *United States v. Kim* (D.Haw. 1976) 415 F.Supp. 1252 (search into apartment using high-powered telescope); *People v. Sneed* (1973) 32 Cal.App.3d 535, 108 Cal.Rptr. 146 (low-altitude helicopter search of private property); *State v. Kender* (1979) 60 Haw. 301, 588 P.2d 447 (telescopic search of backyard). Decisions sustaining searches in similar circumstances have generally involved situations in which the area was routinely exposed to public observation, was not protected from public view or was not closely associated with the home (*United States v. Allen* (9 Cir. 1980) 675 F.2d 1373, certiorari denied (1981) 454 U.S. 833 (helicopter search of property bordering federal land routinely traversed by Coast Guard helicopters); *Fullbright v. United States* (10 Cir. 1968) 392 F.2d 432, certiorari denied (1968) 393 U.S. 830 (search of open shed using binoculars); *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 110 Cal.Rptr. 585 (aerial search of unfenced three-quarter-acre field)).

knowingly exposes his activities to routine public observation is not entitled to prevent the police from also looking. In contrast, this case involved a setting in which routine observation by the general public could neither reasonably be anticipated nor guarded against. Here, the police used invasive modern technology to conduct surveillance of private areas that would not ordinarily be observable by members of the public.¹⁶

Warrantless aerial surveillance, in ways different from other methods of technologically aided surveillance, invites abuse. Everything on the ground that is not covered with blackout cloth is in open view. The homes and yards of suspected offenders and wholly innocent people alike are necessarily surveilled. Aerial searches are, in effect, dragnets. Legitimizing them would alter society's very concept of privacy. If this Court were to announce a rule that homeowners' privacy expectations are now curtailed by police surveillance from the air, the impact of this ruling would extend beyond the curtilage. Once one accepts petitioner's premise that the "airways" are "an open place" where the police must be expected to be, then private activities on a sundeck or viewed through a skylight or picture window would be as open to police surveillance as activities in the backyard. As one commentator has observed:

"[A]nyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the amendment because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and

¹⁶ The State acknowledges that it would have been improper to scale the fence in this case to observe what was within the yard (Br. for Petitioner 20-21). The rationale which would legitimize an equivalent or greater invasion of privacy from an airplane or hovering helicopter is difficult to discern.

in which the amendment is supposed to function. What kind of society is that?" (1 LaFare, *Search and Seizure, A Treatise on the Fourth Amendment* (1978) §2.2 at 261, quoting with approval Amsterdam, *Perspectives on the Fourth Amendment* (1974) 58 Minn.L.Rev. 349, 402).¹⁷

In sum, what a person "knowingly exposes to the public" (*Katz v. United States*, supra, 489 U.S. at 351) is accorded no Fourth Amendment protection. But a historically private area which a person takes reasonable precautions to guard from public view does not lose its constitutional protection by virtue of the failure to take extraordinary steps to guard against unusual police surveillance made possible solely by modern technology. To require extraordinary precautions to prevent such observations would fundamentally alter the protection of the Fourth Amendment as we now understand it. The Fourth Amendment must not be jettisoned because of crime statistics. As this Court stated in *Coolidge v. New Hampshire*, supra, 403 U.S. at 455:

"In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."

¹⁷ To the same purpose, Ringel comments:

"It would be meaningless to say that people have a right to be free from unreasonable searches if the right depends on making observation by outsiders impossible, particularly in light of the sophisticated techniques of surveillance available today" (Ringel, *Searches & Seizures, Arrests and Confessions* (1985) §8.1 at 8-3).

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,

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